

# Agenda

Council

## NOTICE OF MEETING

Notice is hereby given that a meeting of the Council will be held in the

**Council Chamber - Glenelg Town Hall  
Moseley Square Glenelg**

11 March 2025 at 7:00pm



**Pamela Jackson**  
Chief Executive Officer



**1. Opening**

*The Mayor will declare the meeting open at 7pm.*

**2. Kurna Acknowledgement**

*We acknowledge Kurna people as the traditional owners and custodians of this land.*

*We respect their spiritual relationship with country that has developed over thousands of years, and the cultural heritage and beliefs that remain important to Kurna People today.*

**3. Service to Country Acknowledgement**

*The City of Holdfast Bay would like to acknowledge all personnel who have served in the Australian forces and services, including volunteers, for our country.*

**4. Prayer**

*Heavenly Father, we pray for your presence and guidance at our Council Meeting. Grant us your wisdom and protect our integrity as we carry out the powers and responsibilities entrusted to us on behalf of the community that we serve.*

**5. Apologies**

5.1 Apologies received

5.2 Absent

**6. Items Presented to Council**

**7. Declaration Of Interest**

*If a Member has an interest (within the terms of the Local Government Act 1999) in a matter before the Council they are asked to disclose the interest to the Council and provide full and accurate details of the relevant interest. Members are reminded to declare their interest before each item.*

**8. Confirmation Of Minutes**

**That the minutes of the Ordinary Meeting of Council held on Tuesday 25 February 2025 be taken as read and confirmed.**

**9. Public Presentations**

9.1 Petitions - Nil

9.2 Presentations - Nil



- 9.3 Deputations**
- 9.3.1 Mr M Campbell  
*The Mayor has approved a deputation from Mr M Campbell*
- 10. Questions by Members**
- 10.1 **Without Notice**
- 10.2 **On Notice - Nil**
- 11. Member's Activity Reports - Nil**
- 12. Motions on Notice**
- 12.1 Leave of Absence – Councillor Abley (Report No: 62/25)
- 12.2 Leave of Absence – Councillor Venning (Report No: 63/25)
- 12.3 Establishment of a Heritage Committee – Councillor Fleming (Report No: 67/25)
- 13. Adjourned Matters - Nil**
- 14. Reports of Management Committees and Subsidiaries**
- 14.1 Minutes – Alwyndor Management Committee – 13 February 2025 (Report No: 66/25)
- 15. Reports by Officers**
- 15.1 Items in Brief (Report No: 64/25)
- 15.2 Kauri Sporting and Community Complex – Lease to Carly Ball (New Body Loading Personal Training) (Report No: 65/25)
- 15.3 Southern Region Waste Resource Authority – Charter Review 2025 (Report No: 68/25)
- 16. Resolutions Subject to Formal Motions**
- Presented for the information of Members is a listing of resolutions subject to formal resolutions, for Council and all Standing Committees, to adjourn or lay on the table items of Council business, for the current term of Council.*
- 17. Urgent Business – Subject to the Leave of the Meeting**
- 18. Items in Confidence - Nil**
- 19. Closure**



CITY OF  
**HOLDFAST BAY**

A handwritten signature in blue ink that reads "P Jackson". The signature is fluid and cursive, with the first letter 'P' being particularly large and prominent.

**Pamela Jackson**  
Chief Executive Officer

**Item No:** 12.1

**Subject:** MOTION ON NOTICE – LEAVE OF ABSENCE – COUNCILLOR ABLEY

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### **Proposed Motion**

Councillor Abley proposed the following motion:

**That Councillor Abley be granted a leave of absence for the period Friday 14 March 2025 to Monday 14 April 2025 (inclusive).**

**Item No:** 12.2

**Subject:** MOTION ON NOTICE – LEAVE OF ABSENCE – COUNCILLOR VENNING

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### **Proposed Motion**

Councillor Venning proposed the following motion:

**That Councillor Venning be granted a leave of absence for the period Tuesday 23 September 2025 to Tuesday 7 October 2025 (inclusive).**

**Item No:** 12.3

**Subject:** MOTION ON NOTICE – ESTABLISHMENT OF A HERITAGE COMMITTEE – COUNCILLOR FLEMING

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## Proposed Motion

Councillor Fleming proposed the following motion:

**That Council Administration provide a report to Council recommending the establishment of a Heritage Advisory Committee pursuant to section 41 of the *Local Government Act 1999* by 30 June 2025. That such a report contains Terms of Reference for the reporting and other accountability requirements that are to apply to the Heritage Advisory Committee, including matters of membership and scope of responsibility.**

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## Background

Built heritage plays an important part in decision making at the City of Holdfast Bay. Protecting our heritage are the opening words in Council's strategic plan vision, so there is a strong commitment to our community that this Council will protect and recognise the city's remaining built heritage at every opportunity. Whilst this Council has sought to elevate the profile of its built heritage through initiatives such as the Art Deco Review, more can be done to strengthen support for these and other initiatives.

I therefore propose that the City of Holdfast Bay establishes a committee pursuant to section 41 of the Local Government Act to assist Council with advice relating to heritage matters, supporting and partnering with our community in relation to heritage, and assisting Council to preserve and interpret the city's heritage for future generations.

**Item No:** 14.1

**Subject:** MINUTES - ALWYNDOR MANAGEMENT COMMITTEE – 13 FEBRUARY 2025

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## Summary

The minutes of the Alwyndor Management Committee meeting held on 13 February 2025 are provided for information.

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## Recommendation

1. That the minutes of the Alwyndor Management Committee meeting held on 13 February be noted.

### RETAIN IN CONFIDENCE - Section 91(7) Order

2. That having considered Attachment 2 to Report No: 66/25 Minutes - Alwyndor Management Committee –13 February 2025 in confidence under section 90(2) and (3) (b) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of the Act orders that Attachment 2 be retained in confidence for a period of 24 months and that this order be reviewed every 12 months.
- 

## Background

This report is presented following the Alwyndor Management Committee Meetings.

The Alwyndor Management Committee was established to manage the affairs of Alwyndor. The Council has endorsed the Committee's Terms of Reference and given the Committee delegated authority to manage the business of Alwyndor.

## Report

The minutes of the meeting are attached for Members' information.

*Refer Attachments 1 and 2*

## Budget

Not applicable

## Life Cycle Costs

Not applicable

## Strategic Plan

Enabling the people in our communities to live healthy, engaged and fulfilling lives.



## **Council Policy**

Not applicable

## **Statutory Provisions**

Not applicable

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**Written By:** General Manager, Alwyndor

**General Manager:** Ms B Davidson-Park

# Attachment 1

**CITY OF HOLDFAST BAY**

**Minutes of the meeting of the Alwyndor Management Committee of the City of Holdfast Bay held in the Boardroom Alwyndor 52 Dunrobin Road Hove or via Audio-visual telecommunications on Thursday 13 February at 6.30pm.**

**PRESENT**

**Elected Members**

Councillor Susan Lonie  
Councillor Robert Snewin

**Independent Members**

Prof Lorraine Sheppard (Acting Chair)  
Ms Joanne Cottle  
Mr John O'Connor  
Prof Judy Searle

**Staff**

Chief Executive Officer – Ms Pamela Jackson  
General Manager Alwyndor – Ms Beth Davidson-Park  
Executive Manager, Community Connections – Ms Molly Salt  
Executive Manager, Residential Services – Ms Natasha Stone  
Chief Financial Officer - Mr Rafa Mirzaev  
Executive Manager, People and Culture - Ms Lisa Hall  
Executive Manager ICT – Ms Jodie Wardle  
Executive Assistant – Ms Bronwyn Taylor

**1. OPENING**

The Deputy Chair, Prof Lorraine Sheppard, declared the meeting opened at 6.30pm.

The General Manager introduced Jodie Wardle Alwyndor's new Executive Manager ICT.

**2. KAURNA ACKNOWLEDGEMENT**

With the opening of the meeting the Deputy Chair stated:

We acknowledge the Kaurna people as the traditional owners and custodians of this land.

We respect their spiritual relationship with country that has developed over thousands of years, and the cultural heritage and beliefs that remain important to Kaurna People today.

**3. APOLOGIES**

- 3.1 For Absence  
Mr Kim Cheater
- 3.2 Leave of Absence

**4. DECLARATION OF INTEREST**

Committee members were reminded to declare any interest before each item.  
*Attachment 1*

**5. CONFIRMATION OF MINUTES****Motion**

**That the Public and Confidential minutes of the Alwyndor Management Committee held on 28 November 2025 be taken as read and confirmed.**

Moved by Ms Joanne Cottle, Seconded by Cr Susan Lonie

**Carried**

**6. REVIEW OF ACTION ITEMS****6.1 Action Items****6.2 Annual Work Plan**

The draft 2025 Work Plan was presented for the Committee's consideration and approval.

Regarding the Performance Reporting being scheduled 6 monthly rather than quarterly: concern was expressed about the capacity of the AMC to adequately discharge its responsibilities in reviewing bi-annually. As such it was requested that the report frequency remains quarterly.

**Motion**

**That the Alwyndor Management Committee approves the 2025 Work Plan with an amendment that the Performance Report be reinstated for quarterly review.**

Moved by Mr John O'Connor, Seconded by Ms Joanne Cottle

**Carried**

## 7. GENERAL MANAGER REPORT

### 7.1 General Manager Report (Report No: 01/25)

#### 7.1.1 AMC Membership update

The resignation of Ms Trudy Sutton was noted.

It was agreed that a recruitment process for an AMC member with a focus on aged care skills and experience should be undertaken. The Committee requested the skills matrix be distributed for review and any updates as required.

The Deputy Chair asked for expressions of interest to be on the interview panel. It was agreed that Cr Robert Snewin, Prof Lorraine Sheppard and John O'Connor will join Kim Cheater, Chair and the General Manager to form the panel. The General Manager will provide an update on the recruitment process at the March meeting.

#### 7.1.2 Aged Care Reform

The General Manager provided a summary and noted our progress aligns with others in the sector, with shared concerns regarding of the pace of change and continued delays in provision of information. Alwyndor is on track in all areas with available information.

#### Motion:

**That the Alwyndor Management Committee:**

- 1. Note the resignation of Ms Trudy Sutton from AMC.**
- 2. Note that recruitment will commence for a new AMC member with a focus on aged care experience.**
- 3. Note the Aged Care Reform update.**

Moved by Ms Joanne Cottle, Seconded by Cr Susan Lonie

**Carried**

## 8. GENERAL MANAGER REPORT – CONFIDENTIAL

### 8.1 General Manager Report – Confidential (Report No: 02/25)

#### **Exclusion of the Public – Section 90(3)(d) Order**

- 1. That pursuant to Section 90(2) of the *Local Government Act 1999* Alwyndor Management Committee hereby orders that the public be excluded from attendance at this meeting with the exception of the General Manager and Staff in attendance at the meeting in order to consider Reports and Attachments to Report No: 02/25 in confidence.**
- 2. That in accordance with Section 90(3) of the *Local Government Act 1999* Alwyndor Management Committee is satisfied that it is necessary that the public be excluded to consider the information contained in Report No: 10/24 on the following grounds:**

- d. pursuant to section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to confer a commercial advantage on a third party of Alwyndor, in addition Alwyndor's financial position is reported as part of Council's regular budget updates.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.

3. The Alwyndor Management Committee is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.

Moved by Cr Robert Snewin, Seconded by Prof Judy Searle

Carried

**RETAIN IN CONFIDENCE - Section 91(7) Order**

10. That having considered Agenda Item 8.1 General Managers Report – Confidential (Report No: 02/25) in confidence under section 90(2) and (3)(d) of the *Local Government Act 1999*, the Alwyndor Management Committee, pursuant to section 91(7) of that Act orders that the Attachments and Minutes be retained in confidence for a period of 12 months and that this order be reviewed every 12 months.

Moved by MS Joanne Cottle, Seconded by Prof Judy Searle

Carried

**8.2 Finance Report – Confidential (Report No:03/25)**

**Exclusion of the Public – Section 90(3)(d) Order**

1. That pursuant to Section 90(2) of the *Local Government Act 1999* Alwyndor Management Committee hereby orders that the public be excluded from attendance at this meeting with the exception of the General Manager and Staff in attendance at the meeting in order to consider Reports and Attachments to Report No: 03/24 in confidence.
1. That in accordance with Section 90(3) of the *Local Government Act 1999* Alwyndor Management Committee is satisfied that it is necessary that the

**public be excluded to consider the information contained in Report No: 03/25 on the following grounds:**

- d. **pursuant to section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to confer a commercial advantage on a third party of Alwyndor, in addition Alwyndor's financial position is reported as part of Council's regular budget updates.**

**In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.**

3. **The Alwyndor Management Committee is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.**

Moved by Cr Robert Snewin, Seconded by Mr John O'Connor

**Carried**

Cr Susan Lonie returned to room 7.58pm

**RETAIN IN CONFIDENCE - Section 91(7) Order**

4. **That having considered Agenda Item 8.4 Finance Report (Report No:03/25) in confidence under section 90(2) and (3)(d) of the *Local Government Act 1999*, the Alwyndor Management Committee, pursuant to section 91(7) of that Act orders that the Attachments and Minutes be retained in confidence for a period of 3 years and that this order be reviewed every 12 months.**

Moved by Cr Susan Lonie, Seconded by Mr John O'Connor

**Carried**

**9. OTHER BUSINESS – Subject to the leave of the meeting**

The General Manager advised she will be on leave from 17 February to 11 March and Natasha Stone will be Acting GM in her absence.

**10. DATE AND TIME OF NEXT MEETING**

The next meeting of the Alwyndor Management Committee will be held on **Thursday 27 March 2025** in the Boardroom Alwyndor, 52 Dunrobin Road, Hove or via Audio-visual telecommunications (to be advised).

**11. CLOSURE**

The meeting closed at 8.21 pm.

**CONFIRMED 27 March 2025**

**DEPUTY CHAIR**



**Item No:** 15.1

**Subject:** ITEMS IN BRIEF

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## Summary

These items are presented for the information of Members.

After noting the report any items of interest can be discussed and, if required, further motions proposed.

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## Recommendation

**That the following items be noted and items of interest discussed:**

1. **Local Government Sustainability**
  2. **Landmark Decision for Swimming Pool Safety**
  3. **Asia Oasis Street Food Festival by the Sea**
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## Report

### 1. **Local Government Sustainability**

On 14 February 2025, the House of Representatives Standing Committee on Regional Development, Infrastructure and Transport presented its interim report for the inquiry into local government sustainability.

*Refer Attachment 1*

The Federal Parliamentary enquiry has been undertaken with extensive consultation with stakeholders, local governments, councils and shires. 280 submissions were received, and 16 public hearings were held in regional areas.

The local governments that made submissions to this inquiry and participated in public hearings spoke about how their role has evolved significantly to include the navigation of complex regulatory environments, managing limited financial resources, and addressing diverse and sometimes competing community needs and expectations. The interim report makes no formal policy recommendations to government but highlights these emerging themes.

### 2. **Landmark Decision for Swimming Pool Safety**

In early 2024 the City of Holdfast Bay issued an enforcement notice to the owner of 30 Partridge Street, Glenelg asserting that a compliant swimming pool fence had not been installed in accordance with relevant legislation. This stems from an earlier building consent for a swimming pool and spa granted by a private building certifier (i.e. not the Council) in 2023, which upon inspection by the building officer of the

council did not comply with the relevant legislation. Consequently, the council issued an enforcement notice which was subsequently appealed by the homeowner to the Environment, Resources and Development (ERD) Court.

In a judgment delivered on 28 February 2025 the ERD court found in council's favour that owners of swimming pools are required to ensure that a compliant pool safety fence is located between every habitable building and outdoor pool and/or spa, and that decisions of private building certifiers cannot override this fundamental safety requirement. This represents a landmark judgement that will apply throughout South Australia, ensuring that children that enter properties featuring swimming pools remain safe, whilst also guaranteeing a council's right to set the benchmark for swimming pool safety. The full judgement is attached.

*Refer Attachment 2*

### **3. Asia Oasis Street Food Festival by the Sea**

Returning for its third year at Jimmy Melrose Park, Glenelg, the Asia Oasis Street Food Festival by the Sea was held on Thursday 13 February to Sunday 16 February 2025.

The event was a four-day celebration of Asian food, music, culture, and diversity for the whole community. The event featured 20 tropical-style Balinese huts from which first class Asian street food vendors deliver their fare. Attendees were able to sit beside the beach at sunset and enjoy the finest Asian street foods, under the colourful Hoi An, Vietnam ethnic brocade and Thai lanterns.

The official opening night was held on Friday 14 February, being Valentine's Day, and centered around the theme "Love by the Sea," celebrating love in all its forms - romantic, familial, self-love and friendship. Deputy Mayor Jane Fleming was invited to represent the Mayor at the opening, joining event directors and dignitaries Tung Ngo MLC, Jing Le MLC and Stephen Patterson MP, Local Member for Morphett for a cultural dinner. Following the dinner, Deputy Mayor Fleming delivered a speech welcoming attendees to the event.

The event was attended by 25,000 people across the four days peaking in the evenings from 5pm with Saturday 15 February being their busiest day since they started the event in 2023.

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**Written By:** Executive Officer

**Chief Executive Officer:** Ms P Jackson

# Attachment 1



PARLIAMENT OF AUSTRALIA

# **Interim report into local government sustainability**

**House of Representatives**

**Standing Committee on Regional Development, Infrastructure and Transport**

February 2025

CANBERRA

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# Foreword

Local governments, also known as councils, municipalities and shires, play an essential role as the closest tier of governance to communities, and addressing their individual community's needs. Their responsibilities are diverse and complex; comprising a broad range of services and functions that are crucial for community well-being and development.

The Committee is undertaking a thorough review of all the submissions received and evidence gathered at public hearings throughout the inquiry and will subsequently produce a final report. In the meantime, the Committee has agreed to present an interim report to provide an update on the work it has undertaken to date, along with a brief overview on the key themes emerging from the inquiry.

Evidence reviewed to date shows that local government diversity across urban, regional, rural, and remote areas, changing population trends, varied funding bases, and infrastructure networks place increasing demands on financial sustainability. This is evident within the context of increased service delivery obligations and cost shifting.

The role of local governments has evolved and expanded significantly over time beyond their traditional purview of rates, roads, and rubbish. Local governments are increasingly relied upon to provide services and manage complex infrastructure assets, some of which were formally the responsibility of the Commonwealth, State, and Northern Territory governments.

Evidence considered to date, shows that councils' responsibilities can include:

- health, aged care, childcare, and mental health services
- housing supply planning and development and provision of enabling infrastructure
- progressively complex infrastructure and asset management, including maintaining depreciating assets
- environmental regulatory compliance and management obligations
- climate adaptation and emergency management.

Other challenges raised by stakeholders include the financial impact of expanding service delivery obligations and cost shifting; restrictions associated with revenue raising and access and equitable distribution of grants funding; co-contributions inhibiting financially challenged councils access to grants; and workforce recruitment and retention, including skills shortages.

I wish to extend my sincere thanks to the many local councils, local government organisations, state and territory governments, organisations and individuals who have taken the time to provide submissions to the inquiry and provide evidence at public hearings across Australia.

I also extend my thanks to my parliamentary colleagues on the Committee for their work and ongoing constructive advice and to the Committee Secretariat for their professional approach, diligence and commitment throughout this important inquiry process.

**Mr Luke Gosling OAM, MP**  
**Chair**

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# Terms of reference

The House of Representatives Standing Committee on Regional Development, Infrastructure and Transport will inquire into and report on local government matters, with a particular focus on:

- The financial sustainability and funding of local government
- The changing infrastructure and service delivery obligations of local government
- Any structural impediments to security for local government workers and infrastructure and service delivery
- Trends in the attraction and retention of a skilled workforce in the local government sector, including impacts of labour hire practices
- The role of the Australian Government in addressing issues raised in relation to the above
- Other relevant issues.





# Members

## **Chair**

Mr Luke Gosling OAM MP Solomon, NT

## **Deputy Chair**

Mr Tony Pasin MP Barker, SA

## **Members**

Mr Colin Boyce MP Flynn, QLD

Hon Scott Buchholz MP Wright, QLD

Ms Lisa Chesters MP Bendigo, VIC

Dr Helen Haines MP Indi, VIC

Mr Rob Mitchell MP McEwen, VIC

Ms Tracey Roberts MP Pearce, WA

Ms Joanne Ryan MP Lalor, VIC

Mr Tony Zappia MP Makin, SA

*This Committee is supported by staff of the Department of the House of Representatives.*





# Initial reflections

## About this inquiry

- 1.1 On 21 March 2024, the Committee adopted an inquiry into local government sustainability following a referral from the Minister for Infrastructure, Transport, Regional Development and Local Government, the Hon Catherine King MP.
- 1.2 The terms of reference for the inquiry are listed on page v of this report.
- 1.3 The Committee received 287 submissions. These are listed at Appendix A.
- 1.4 The Committee held 16 public hearings in person and via videoconference, in Canberra, Launceston, Wallan, Adelaide, Cairns, Beaudesert and Perth. These are listed at Appendix B.
- 1.5 The Committee is undertaking a thorough examination of all the evidence it received and will subsequently produce a final report. The Committee has however decided to use an interim report to provide an update on work undertaken to date and provide a brief overview on emerging themes from the inquiry.
- 1.6 Local governments (often called councils, municipalities or shires) play a crucial role, acting as the closest tier of governance to the community and addressing various needs and concerns at the grassroots level. Their roles and responsibilities are diverse and multifaceted, encompassing a wide range of services and functions that are essential for the well-being and development of communities.
- 1.7 Capital city, urban, regional, rural and remote Local Government Areas (LGAs) each face vastly different and unique challenges. The diversity between local governments in each state and the Northern Territory (NT) is substantial and there are significant differences in:
  - size and population
  - road length and infrastructure
  - fiscal position, resources and skills base
  - physical, social and cultural environments
  - attitudes and aspirations of their communities, and
  - legislative frameworks.

- 1.8 The Centre for Population highlighted the differences in the over 560 LGAs<sup>1</sup> (537 councils)<sup>2</sup> across Australia, noting that their growth rates change year on year:

LGAs range from being over 300,000 km<sup>2</sup> (e.g. East Pilbara in Western Australia) to close to one square km (e.g. Peppermint Grove in Western Australia).

Similarly, population varies greatly between LGAs. The largest LGAs, like Brisbane (Queensland), have populations over 1 million, while the smallest, like Maralinga Tjarutja (South Australia) have populations under 100.<sup>3</sup>

- 1.9 The Centre also noted that LGAs differ in the speed at which they grow and how they grow:

There are three components that make up the population growth of an LGA:

- Net overseas migration: The balance between people moving into and out from the LGA from overseas.
- Net internal migration: The balance between people moving into and out from the LGA from elsewhere in Australia.
- Natural increase: The difference between the number of births and number of deaths in the LGA.<sup>4</sup>

## Local government and the Commonwealth Constitution

- 1.10 The Commonwealth Constitution establishes Australia's federal system. It is a dualist federal system, in which powers and functions are allocated to two levels of government—at the Commonwealth level (first tier) and at the state and territory level (second tier). Local governments or councils are not mentioned in the Australian Constitution; however, each state and the NT has a local government Act that 'provides the rules for the creation and operation of councils'.<sup>5</sup> In general, these acts 'cover how councils are elected and their power to make and enforce local laws, known as by-laws'.<sup>6</sup>

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<sup>1</sup> Australian Bureau of Statistics, 'Local Government Areas', <https://www.abs.gov.au/statistics/standards/australian-statistical-geography-standard-asgs-edition-3/jul2021-jun2026/non-abs-structures/local-government-areas>, accessed 15 November 2024.

<sup>2</sup> Local Government Information Unit, 'Facts and figures: Australia', <https://lgiu.org/resources/local-government-facts-and-figures/facts-and-figures-australia/>, accessed 15 November 2024.

<sup>3</sup> Centre for Population, 'Fastest growing Local Government Areas', <https://population.gov.au/population-topics/topic-growth-lga>, accessed 7 November 2024.

<sup>4</sup> Centre for Population, 'Fastest growing Local Government Areas', <https://population.gov.au/population-topics/topic-growth-lga>, accessed 7 November 2024.

<sup>5</sup> Parliamentary Education Office, 'How does the Commonwealth Constitution create a third level of Government?', <https://peo.gov.au/understand-our-parliament/your-questions-on-notice/questions/how-does-the-commonwealth-constitution-create-a-third-level-of-government>, accessed 20 November 2024.

<sup>6</sup> Parliamentary Education Office, 'How does the Commonwealth Constitution create a third level of Government?', <https://peo.gov.au/understand-our-parliament/your-questions-on-notice/questions/how-does-the-commonwealth-constitution-create-a-third-level-of-government>, accessed 20 November 2024.

- 1.11 The state and NT governments delegate authority to councils to make laws on specific matters, however, council by-laws may be overruled by state and territory legislation as councils derive their powers from their individual state and NT parliaments.<sup>7</sup> Local governments are primarily accountable to the second tier of government and local constituents to discharge their responsibilities under state and territory legislative frameworks.<sup>8</sup>
- 1.12 A local government's ability to raise revenue is also derived from state and territory legislation. Local governments may raise revenue through rates, duties and charges, user fees, fines and other penalties, developer contributions and charges, the accumulation of interest on financial accounts, and through grants from the Commonwealth, state and NT governments.<sup>9</sup> Local governments' sole source of taxation revenue is from property taxes.<sup>10</sup>

## Local Government Financial Assistance Grants

- 1.13 The Australian Government has been providing Financial Assistance Grants to local governments since 1974–75. Until the territories achieved self-government, these grants did not cover the Australian Capital Territory (ACT) or the NT. Grants for local government bodies in the NT began in 1979–80. And while the ACT does not have a local government system, a grant for municipal purposes was established in 1988–89. Additionally, local roads grants were added to the Financial Assistance Grant program in 1991–92.<sup>11</sup>
- 1.14 To date, the Australian Government has provided over \$70 billion under the Financial Assistance Grant program, under the *Local Government (Financial Assistance) Act 1995 (Cth)* (the Act), to local governments.<sup>12</sup>
- 1.15 Financial Assistance Grants are paid as tied grants through the state and NT governments, and have two components:
- a general purpose component which is distributed between the states and territories according to population (i.e. on a per capita basis), and

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<sup>7</sup> Parliamentary Education Office, 'How does the Commonwealth Constitution create a third level of Government?', <https://peo.gov.au/understand-our-parliament/your-questions-on-notice/questions/how-does-the-commonwealth-constitution-create-a-third-level-of-government>, accessed 20 November 2024.

<sup>8</sup> Adjunct Professor Graham Sansom, *Submission 280*, p. 2.

<sup>9</sup> Section 96 of the Australian Constitution allows the federal government to grant money to the states and to tell the states how this money is to be spent.

<sup>10</sup> Australian Bureau of Statistics, 'Taxation Revenue, Australia methodology', <https://www.abs.gov.au/methodologies/taxation-revenue-australia-methodology/2022-23>, accessed 20 November 2024.

<sup>11</sup> Standing Committee on Economics, Finance and Public Administration, *Rates and Taxes: A Fair Share for Responsible Local Government*, October 2003, Appendix F.

<sup>12</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Financial Assistance Grant to Local Government', <https://www.infrastructure.gov.au/territories-regions-cities/local-government/financial-assistance-grant-local-government>, accessed 20 November 2024.



- an identified local road component which is distributed between the states and territories according to fixed historical shares.<sup>13</sup>

1.16 The Department of Infrastructure, Transport, Regional Development, Communications and the Arts website (the Department) states that:

Both components of the grant are untied in the hands of local government, allowing councils to spend the grants according to local priorities.

Local government grants commissions in each state and the Northern Territory recommend the distribution of the funding under the Financial Assistance Grant program to local governing bodies in accordance with the Act and the National Principles for allocating grants.<sup>14</sup>

1.17 The National Principles relating to the allocation of general purpose grants payable under section 9 of the Act among local governing bodies are:

- Horizontal equalisation—general purpose grants will be allocated to local governing bodies, as far as practicable, on a full horizontal equalisation basis
- Effort neutrality—a policy neutral approach will be used in assessing the expenditure requirements and revenue-raising capacity of each local governing body
- Minimum grant—a minimum general purpose grant allocation for a local governing body in a year will be not less than the amount to which the local governing body would be entitled if 30 per cent of the total amount of general purpose grants to which the state or NT is entitled
- Other grant support—relevant grant support provided to local governing bodies to meet any of the expenditure needs assessed should be taken into account using an inclusion approach
- Aboriginal peoples and Torres Strait Islander peoples—financial assistance shall be allocated to councils in a way, which recognises the needs of Aboriginal peoples and Torres Strait Islander peoples
- Council amalgamation—the general purpose grant provided to the new body for each of the four years following amalgamation should be the total of the amounts that would have been provided to the former bodies.<sup>15</sup>

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<sup>13</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Financial Assistance Grant to Local Government', <https://www.infrastructure.gov.au/territories-regions-cities/local-government/financial-assistance-grant-local-government>, accessed 20 November 2024.

<sup>14</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Financial Assistance Grant to Local Government', <https://www.infrastructure.gov.au/territories-regions-cities/local-government/financial-assistance-grant-local-government>, accessed 20 November 2024.

<sup>15</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'National principles for the allocation of grants under the Local Government (Financial Assistance) Act 1995', <https://www.infrastructure.gov.au/territories-regions-cities/local-government/financial-assistance-grant-local-government/national-principles-allocation-grants>, accessed 20 November 2024.

- 1.18 Additionally, some of the current grants transferred from Commonwealth to state, NT and local governments are Specific Purpose Payments (SPPs):

Unlike the GST-related grants, these payments are 'tied' to specific policy areas as agreed between the two levels of government. Similar arrangements exist between state and local government. SPPs for current purposes are included with other current grants in deriving adjusted taxation revenue.<sup>16</sup>

## Emerging themes

- 1.19 Over time, the role of local governments has expanded exponentially beyond the three Rs—rates, roads and rubbish. They have increasingly been relied upon to deliver services and infrastructure which were traditionally under the purview of the Commonwealth, state and territory governments. Stakeholders indicated that many new roles and responsibilities are a consequence of the practice of cost shifting.
- 1.20 Throughout the inquiry to date, the Committee received substantial evidence through submissions and at public hearings on how local government financial sustainability and funding frameworks were being impacted by evolving infrastructure requirements, service delivery obligations and cost shifting.
- 1.21 The Committee heard that some LGAs have increasingly taken on responsibility for the management of health, aged care and childcare, and mental health related services. LGAs have also been playing an increasing regulatory role in the areas of development and infrastructure/asset management and planning, housing, environmental biodiversity/conservation requirements, and climate adaptation management.
- 1.22 The Committee also heard about challenges associated with the application of the Financial Assistance Grants.
- 1.23 A brief overview of the evidence received to date on these themes is provided below.

## Financial Assistance Grants

- 1.24 Submitters were of the view that the current distribution model was not working. The Grattan Institute stated that the current allocation process had three significant impacts:

First, the general component of the Financial Assistance Grants favours densely populated states, so similar councils in different states get vastly different funding outcomes. Second, the minimum grant to all councils diverts too large a share of funding away from councils that are least able to raise their own revenue. Third, the outdated distribution of the local roads component creates large variations in

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<sup>16</sup> Australian Bureau of Statistics, 'Taxation Revenue, Australia methodology', <https://www.abs.gov.au/methodologies/taxation-revenue-australia-methodology/2022-23>, accessed 20 November 2024.

outcomes for similar councils in different parts of the country, and provides too large a share of the funding to self-sufficient councils.<sup>17</sup>

- 1.25 Professor Sansom believed that the current model appeared to be favouring metropolitan regions over rural and remote councils noting that:

...in 2023–24 ten NSW councils received only the minimum \$24.85 per capita grant, indicating effectively no need for assistance, and a further eleven received less than 10 [per cent] more than the minimum (less than \$27), suggesting at best very little need. All those councils are located in the Sydney metropolitan region, and the great majority comprised mostly well-established affluent suburbs where the community might be expected to have considerable capacity to pay an extra \$27 per capita in council rates. Moreover, for no apparent reason two other notoriously affluent suburban councils received well above the minimum grant.

In total, those 23 councils absorbed around \$76 million in general-purpose grants. Such an amount could make a very big difference to sustainability and service delivery amongst rural-remote councils, whilst also providing assistance for fast-growing areas experiencing financial stress.<sup>18</sup>

- 1.26 The Canberra Region Joint Organisation, Byron Shire Council, South Gippsland Shire Council, Shire of Shark Bay, Upper Hunter Shore Council, and Muswellbrook Shire Council questioned the fairness of the state formula for allocation of Federal Financial Assistance Grants between regional and metropolitan councils.<sup>19</sup>

- 1.27 Murrindindi Shire Council recommended that the Australian Government review and amend the allocation criteria used for Commonwealth Financial Assistance Grants to recognise small rural LGAs' financial constraints. The Council submitted that small rural councils have 'limited incoming generating options [and a] higher cost base due to lower population density'. Rates and charges are the Council's main source of income, but this represents only 56 per cent of its revenue. Murrindindi is unable to raise rates to more than the Victorian Government's rate cap mechanism, which it advised is set well below inflation and operating cost increases. To underscore this, the Council advised that analysis undertaken by Municipal Association of Victoria and FinPro in 2022, estimated:

...that cumulatively over the first 4 years of rate capping (introduced in 2016/17) the gap between the increase in the local government cost base and the rate cap increase was 4% for the sector and 9% for small rural councils, indicating a compounding erosion of the rate base.<sup>20</sup>

- 1.28 Submitters suggested that the horizontal equalisation principle was also ineffective. The Grattan Institute stated that the 'horizontal equalisation principle—that all

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<sup>17</sup> Grattan Institute, *Submission 74*, p. 16.

<sup>18</sup> Adjunct Professor Graham Sansom, *Submission 280*, p. 6.

<sup>19</sup> Canberra Region Joint Organisation, *Submission 258*, p. 15; Byron Shire Council, *Submission 82*, p. 3; South Gippsland Shire Council, *Submission 49*, p. 1; Shire of Shark Bay, *Submission 76*, p. 2; Upper Hunter Shore Council, *Submission 24*, p. 2; Muswellbrook Shire Council, *Submission 177*, p. 5.

<sup>20</sup> Murrindindi Shire Council, *Submission 217*, p. 5.

councils should have the capacity to provide similar services to their communities—is in tension with the principle that dictates minimum grants'.<sup>21</sup>

- 1.29 Murrindindi Shire Council too highlighted horizontal equalisation as a core principle the of Financial Assistance Grants allocation process. Specifically stating that 'the funding allocation should contribute to each council's ability to function, by reasonable effort, at a standard not lower than the average standard of other councils in the State/Territory'.<sup>22</sup> However, despite operating cost effectively, community satisfaction indicators across the Shire show that it is unable to achieve comparable outcomes to the average performance of all other Victorian councils.<sup>23</sup>
- 1.30 The Shire of Wyndham East Kimberley stated that 'in practice [horizontal equalisation] is not evident in Western Australia as there are extremely large differences in the average standards between the metropolitan local governments and the regional and remote local governments'.<sup>24</sup>
- 1.31 The West Australian Local Government Grants Commission noted that it was 'unable to distribute on a full horizontal equalization basis due to the size of the General Purpose Grant (GPG) pool being approximately 37 per cent smaller than the Commission's assessment of the relative need for local governments in WA'.<sup>25</sup>
- 1.32 Mansfield Shire Council recommended that the horizontal equalisation approach be reviewed. The Shire suggested such a review take into account the Victorian Government's 'Fair Go Rates' system to ensure funding is allocated more fairly across 'small shire cohorts who don't have the same scale of rate payer base'.<sup>26</sup>
- 1.33 The allocation of competitive funding was also considered an ongoing issue by several submitters. The Western Queensland Alliance of Councils stated that there was too much focus on competitive funding programs:
- Both the Australian and State Governments place too heavy a focus on, and allocate too much money to, competitive funding programs that generally target new infrastructure projects ('wants') rather than the renewal, upgrade and maintenance of existing, essential infrastructure projects ('needs') at the expense of smaller Councils in rural and remote areas.<sup>27</sup>
- 1.34 Several councils and shires called for untied non-competitive funding including the City of Moreton Bay, Shire of Chapman Valley, Shire of Morawa, Yarra Ranges

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<sup>21</sup> Grattan Institute, *Submission 74*, p. 18.

<sup>22</sup> Murrindindi Shire Council, *Submission 217*, p. 4.

<sup>23</sup> Murrindindi Shire Council, *Submission 217*, p. 4.

<sup>24</sup> Shire of Wyndham East Kimberley, *Submission 67*, p. 2.

<sup>25</sup> Western Australian Local Government Grants Commission, *Submission 218*, p. 2.

<sup>26</sup> Mansfield Shire Council, *Submission 210*, p. 1.

<sup>27</sup> Western Queensland Alliance of Councils, *Submission 176*, p. 3.

Council, Mid Murray Council, the City of Ballarat, and the City of Greater Geelong, to highlight a few.<sup>28</sup>

- 1.35 A significant number of submitters called for a review of the Financial Assistance Grants program, and in particular the distribution formula, quantum of the funding pool, indexation methodology, and the national principles.<sup>29</sup>
- 1.36 The Kimberley Regional Group, the Australian Logistics Council, and the Central Desert Regional Council called for a targeted 'review into the distribution formula of the Financial Assistance Grants road component to ensure smaller and remote councils have the capacity to maintain the roads under their responsibility'.<sup>30</sup>

## Co-contributions

- 1.37 The Department of Infrastructure, Transport, Regional Development, Communications and the Arts submission listed a number of supplementary funding programs and initiatives; some of which require eligible applicants to make co-contributions including the Bridges Renewal Program, Heavy Vehicle Rest Area Initiative, Heavy Vehicle Safety and Productivity Program, Mobile Black Spot Program, Mobile Network Hardening Program, Regional Connectivity Program.<sup>31</sup>
- 1.38 Councils commented that the requirement was problematic and that many were not necessarily capable of co-contributing to grant schemes. The Local Government Association of Queensland stated that:
- ...when grant funding is competitive (requiring significant investment of time and resources to apply for the grant), or requires funding to be matched by a council (for example, through a co-contribution), it creates challenges for councils, in particular those with a higher reliance on grants.<sup>32</sup>
- 1.39 The Country Mayors Association of NSW noted that 'smaller regional councils are missing out on funding opportunities because they do not have available cash surplus to fund a co-contribution'.<sup>33</sup> The Local Government Association of the Northern Territory believed that the co-contribution requirement was acting as an inhibitor for councils to even apply for funding.<sup>34</sup>

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<sup>28</sup> City of Moreton Bay, *Submission 99*, p. 5; Shire of Chapman Valley, *Submission 93*, p. 5; Shire of Morawa, *Submission 88*, p. 5; Yarra Ranges Council, *Submission 73*, p. 3; Mid Murray Council, *Submission 260*, p. 5; City of Ballarat, *Submission 251*, p. 3; City of Greater Geelong, *Submission 207*, p. 9.

<sup>29</sup> Western Australian Local Government Association, *Submission 96*, p. 6; Local Government Association of Queensland, *Submission 257*, p. 36; Canberra Region Joint Organisation, *Submission 258*, p. 6; Grattan Institute, *Submission 74*, p. 16; Civil Contractors Federation, *Submission 247*, p. 3; Regional Capitals Alliance of WA, *Submission 124*, p. 6.

<sup>30</sup> Kimberley Regional Group, *Submission 123*, p. 2; Australian Logistics Council, *Submission 107*, p. 2; Central Desert Regional Council, *Submission 9*, p. 4.

<sup>31</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Submission 38*, pages. 19-32.

<sup>32</sup> Local Government Association of Queensland, *Submission 257*, p. 3.

<sup>33</sup> Country Mayors Association of NSW, *Submission 188*, p. 22.

<sup>34</sup> Local Government Association of the Northern Territory, *Submission 86*, p. 3.

- 1.40 A consistent theme was that the co-contribution requirements, and alignment with grantor priorities often pose barriers to accessing funding and restricting financially challenged councils from sourcing competitive grant funding for major (and essential) infrastructure upgrades or critical maintenance.

## Healthcare providers

- 1.41 LGAs from around Australia commented on how they were increasingly required to provide healthcare services for their communities for a multitude of reasons. Some of the evidence received noted that as health services are reduced or removed from communities across Australia, local governments feel they must step in because there is no-one else.<sup>35</sup> Further noted by submitters was that community expectations have increased, along with government expectations, around each councils' role in supporting preventative healthcare, ageing-in-place, dementia and youth services.<sup>36</sup>
- 1.42 Councils are also providing infrastructure, such as buildings, to house general practitioner services in rural and regional areas.<sup>37</sup> For example, councils in regional South Australia (SA) are taking on and running medical centres due to gaps in that market.<sup>38</sup>
- 1.43 Other LGAs in WA and the NT commented that they were also experiencing challenges delivering appropriate healthcare to their communities. Sixty-six per cent of WA LGA members advised that they provide financial or in-kind support towards the provision of healthcare services.<sup>39</sup>

## Aged care providers

- 1.44 LGAs have expressed an increased expectation from their communities to provide aged care services. The Department of Health and Aged Care noted that 'there are 152 councils that are involved in providing aged-care services either residential aged care through a facility or through the Commonwealth Home Support Program'.<sup>40</sup>
- 1.45 LGAs' submissions also noted that the increased prevalence of providing aged care services is impacting their financial sustainability. Several factors have been

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<sup>35</sup> Mayor Dean Johnson, President, Local Government Association of South Australia, *Committee Hansard*, 7 June 2024, p. 3.

<sup>36</sup> Mr Dion Lester, Chief Executive Officer, Local Government Association of Tasmania, *Committee Hansard*, 25 July 2024, p. 7.

<sup>37</sup> Mrs Darriea Turley, President, Local Government NSW, *Committee Hansard*, 25 July 2024, p. 11.

<sup>38</sup> Mr Simon Millcock, Chief Executive Officer, Northern and Yorke Local Government Association, *Committee Hansard*, 27 September 2024, p. 33.

<sup>39</sup> Councillor Karen Chappel, President, Western Australian Local Government Association, *Committee Hansard*, 7 June 2024, p. 6.

<sup>40</sup> Ms Trisha Garrett, First Assistant Secretary, Service Delivery Division, Ageing and Aged Care Group, Department of Health and Aged Care, *Committee Hansard*, 4 July 2024, p. 2.

identified for this, including that councils are having to facilitate the provision of aged care due to the absence of state and NT government services,<sup>41</sup> or market failures.<sup>42</sup>

- 1.46 Communities also identified that independent living and aged care services are not being provided by the market or another provider in their local areas.<sup>43</sup> One council stated that they were reluctant to get out of providing aged care services because there are not many providers wanting to cover markets where there is a high level of demand across large distances.<sup>44</sup> Local Government NSW advised that approximately seven to eight councils, mainly in the states rural and regional areas, provide aged care services due to market gaps.<sup>45</sup>

## Childcare providers

- 1.47 Many LGA's that provided a submission to this inquiry noted that they had also commenced providing childcare services due to the lack of viability in the childcare market for private providers. The Australian Local Government Association highlighted that collectively local governments 'are one of the largest providers of childcare in Australia'.<sup>46</sup>
- 1.48 Regional Development Australia Tasmania stated that many small, rural councils subsidise or offer these services as they are considered commercially unviable by the private sector.<sup>47</sup>
- 1.49 The Corangamite Shire Council commented that some councils were considering long-term involvement in the childcare sector as a provider, adding:
- Demand for childcare services is high along with infrastructure costs, workforce is scarce and market failure exists in many communities. Historically, councils have met the cost of market failure, especially in rural communities. For these services to be viable, government funding is required.<sup>48</sup>
- 1.50 Submitters also noted that a lack of appropriate and affordable childcare was acting as an inhibitor to councils attracting a workforce.<sup>49</sup> The Lockhart Shire Council noted that the closure of private owned childcare had significant 'flow on effects with some parents potentially having to reduce their working hours or, worse still, having to

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<sup>41</sup> Mr Peter Tegart, Partner, Always Thinking Advisory, *Committee Hansard*, 25 July 2024, p. 25.

<sup>42</sup> Mr Dion Lester, Chief Executive Officer, Local Government Association of Tasmania, *Committee Hansard*, 25 July 2024, p. 7.

<sup>43</sup> Ms Samantha Batchelor, Tasmanian Coordinator, Australian Services Union, *Committee Hansard*, 25 September 2024, p. 28.

<sup>44</sup> Mr Ed Small, Director, Corporate and Governance Services, Moyne Shire Council, *Committee Hansard*, 26 September 2024, p. 29.

<sup>45</sup> Mrs Darriea Turley, President, Local Government NSW, *Committee Hansard*, 25 July 2024, p. 11.

<sup>46</sup> Australian Local Government Association, *Submission 181*, p. 1.

<sup>47</sup> Regional Development Australia Tasmania, *Submission 155*, p. 2.

<sup>48</sup> Corangamite Shire Council, *Submission 77*, p. 4.

<sup>49</sup> Local Government Association of Queensland, *Submission 257*, p. 22.

cease working all together at a time when local businesses are having difficulty is attracting staff'.<sup>50</sup>

- 1.51 Local Government NSW noted that 'a lot of the council funded childcare centres now were set up under prior federal government schemes where grants were available, and the buildings or property were contributed' adding that when Government subsidies were removed, councils came to the conclusion 'that they had to be subsidised by their rate base because their communities needed the care'.<sup>51</sup>

## Mental health services

- 1.52 Submitters to the inquiry raised concerns about a lack of funding support to deliver appropriate mental health services in rural, regional and remote Australia. Underscoring that access to mental health services is a significant challenge for many councils and their communities.
- 1.53 Local governments are expected by communities and other levels of government to support mental healthcare, social inclusion, and support for vulnerable populations.<sup>52</sup> Lesser access to mental health services can leave people in regional, rural and remote areas particularly vulnerable to mental health problems and suicide.<sup>53</sup> As such, essential mental healthcare programs are being provided, funded or subsidised by councils.<sup>54</sup> But local governments are not adequately equipped to respond to and deal with greater levels of mental health issues, domestic violence and substance misuse.<sup>55</sup>
- 1.54 Additional challenges include:
- a lag time between population growth and sufficient delivery of mental health services, which is evident in all states and the NT, requiring improvement planning for communities being established in growth areas<sup>56</sup>
  - infrastructure gaps and limited private commercial space for mental health services has necessitated councils to investigate and fund additional facilities to house providers.<sup>57</sup>

## Infrastructure and asset management

- 1.55 The Local Government Association of SA submitted that around 10 per cent of the infrastructure owned and managed by councils is in poor condition and requires

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<sup>50</sup> Lockhart Shire Council, *Submission 19*, p. 3.

<sup>51</sup> Mr David Reynolds, Chief Executive, Local Government NSW, *Committee Hansard*, 25 July 2024, p. 12

<sup>52</sup> Knox City Council, *Submission 105*, p. 9.

<sup>53</sup> Suicide Prevention Australia, *Submission 136*, p. 2.

<sup>54</sup> Western Queensland Alliance of Councils, *Submission 176*, p. 43.

<sup>55</sup> Campaspe Shire Council, *Submission 172*, p. 8.

<sup>56</sup> National Growth Areas Alliance, *Submission 228*, p. 7.

<sup>57</sup> Redland City Council, *Submission 209*, p. 15.



intervention.<sup>58</sup> In particular, ageing infrastructure was highlighted as a significant contributing factor influencing the financial sustainability of councils.

- 1.56 Many councils commented on the challenges in meeting the maintenance and rural requirements of their ageing infrastructure.<sup>59</sup> Kiama Municipal Council referenced an Australian Local Government Association report which concluded that \$30 billion was required to renew and replace ageing infrastructure in 2018 which was only expected to increase overtime:

The amount of infrastructure requiring renewal will continue to increase over the next 20 years as structures built during the post-war “Baby boom” and the rapid growth period of the 1960s and ’70s age and their condition, capacity and function declines. This infrastructure cliff is fast approaching and requires strategic management and coordination, rather than distribution among political grants / donations.<sup>60</sup>

- 1.57 Indigo Shire Council stated that ageing infrastructure was increasing financial strain on councils, principally in regional areas.<sup>61</sup>

- 1.58 Knox City Council commented on the wider impacts of maintaining ageing infrastructure:

Many councils are facing the challenge of maintaining and upgrading aging infrastructure. This includes roads, bridges, public buildings that require significant investment to ensure safety, inclusion and functionality. Where councils are unable to renew infrastructure in a timely manner this results in increased maintenance costs and may result in a reduction of overall facilities to communities if councils are unable to renew due to funding constraints may result in the loss of facilities within communities.<sup>62</sup>

- 1.59 Infrastructure Australia’s 2019 Infrastructure Audit identified a number of challenges across varied sectors due to ageing infrastructure including:

- much of Australia’s school infrastructure is ageing and not fit for purpose for 21<sup>st</sup> century learning
- competing priorities are reducing the focus on maintaining ageing assets in tertiary education infrastructure

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<sup>58</sup> Mayor Dean Johnson, President, Local Government Association of South Australia, *Committee Hansard*, 7 June 2024 p. 1.

<sup>59</sup> Rural Councils Victoria, *Submission 138*, p. 6; Western Queensland Alliance of Councils, *Submission 176*, p. 2; Hindmarsh Shire Council, *Submission 169*, p. 3; Always Thinking Advisory, *Submission 80*, p. 4; Glen Eira City Council, *Submission 33*, p. 9; Broken Hill Shore Council, *Submission 261*, p. 2; Local Government Association of QLD, *Submission 257*, p. 4; Regional Capital Alliance of Western Australia, *Submission 124*, p. 8.

<sup>60</sup> Kiama Municipal Council, *Submission 75*, p. 13.

<sup>61</sup> Indigo Shire Council, *Submission 29*, p. 3.

<sup>62</sup> Knox City Council, *Submission 105*, p. 9.

- ageing justice infrastructure assets are not fit-for-purpose for changing user demographics and needs
  - many major coal generation assets are ageing and approaching retirement
  - urban water sector faces considerable risks, including the impacts of climate change, population growth, ageing assets
  - many regional and remote utilities face mounting costs to maintain, renew or upgrade ageing water and wastewater assets, but have limited funding through grants or revenue.<sup>63</sup>
- 1.60 State and NT LGAs highlighted several challenges they were experiencing including revenue, construction and maintenance costs, ageing infrastructure, project backlog, and management obligations.
- 1.61 Local Government NSW put forward the view that ‘the financial sustainability of councils has been undermined by a relative decline in financial assistance from federal and state governments, councils’ rate pegging and other factors for over 40 years, [resulting in the] under provision of community infrastructure and services and the deferral of infrastructure maintenance and renewal expenditure’.<sup>64</sup>
- 1.62 With population growth, ageing infrastructure and project backlogs for new infrastructure to support that growth is becoming increasingly challenging.<sup>65</sup> Infrastructure is outdated and many building assets are at or near end of life; there is not enough budget to conduct the required annual maintenance or build fit for purpose replacements and divest liabilities.<sup>66</sup>
- 1.63 These needs are not being met due to an inability for councils to generate sufficient funds themselves.<sup>67</sup> Additionally, subsidising or providing other community services is diverting resources away from the construction and maintenance of public infrastructure.<sup>68</sup>
- 1.64 Councils have significant asset management obligations, with aged infrastructure and increasing maintenance and renewal costs, and depreciation impacts.<sup>69</sup> It costs over \$35 billion to manage assets and infrastructure within some LGA boundaries; while the cost of replacing assets in poor condition exceeds the total annual revenue available to those local governments.<sup>70</sup>
- 1.65 This shortfall provides a strong incentive for councils to delay the maintenance of long-term infrastructure assets like roads and bridges, since the costs of delaying

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<sup>63</sup> Infrastructure Australia, *An Assessment of Australia’s Future Infrastructure Needs, The Australian Infrastructure Audit 2019*, pages. 57-73.

<sup>64</sup> Mrs Darriea Turley, President, Local Government NSW, *Committee Hansard*, 25 July 2024, p. 9.

<sup>65</sup> Mr Stephen, Hughes, Northern Manager, United Services Union, *Committee Hansard*, 25 July 2024, p. 28.

<sup>66</sup> Australian Services Union, *Submission 140*. p. 11.

<sup>67</sup> Mr Stephen, Hughes, Northern Manager, United Services Union, *Committee Hansard*, 25 July 2024, p. 28.

<sup>68</sup> Mr Peter Tegart, Partner, Always Thinking Advisory, *Committee Hansard*, 25 July 2024, p. 23.

<sup>69</sup> City of Mount Gambier, *Submission 65*, p. 4.

<sup>70</sup> Local Government Association of South Australia, *Submission 95*, p. 20.

maintenance are not felt for some time.<sup>71</sup> In 2006 there was a national local government infrastructure backlog ranging between \$12.0 billion and \$15.3 billion, with an annual shortfall in expenditure on existing local infrastructure renewal of between \$0.9 billion to \$1.2 billion.<sup>72</sup>

## Maintaining depreciating assets

1.66 Councils manage significant physical assets such as infrastructure (roads, water, sewerage, storm water drains, bridges) and buildings. Many of these assets have long lifespans and are prone to substantial variations in value throughout the duration of council ownership, usually to reflect wear and tear. Initially these assets are measured and presented at their fair value. Over time, 'assets are re-measured periodically to reflect changes in their current value, with the resulting change, generally, being reflected in an asset revaluation reserve'.<sup>73</sup>

1.67 Submitters defined depreciation as:

Depreciation is a planned, gradual reduction in the recorded value of an asset over its useful life by charging it to expense. The use of depreciation is intended to spread expense recognition over the period of time when a business expects to earn revenue from the use of the asset.<sup>74</sup>

1.68 The Local Government Association of Queensland estimated that 'around 20 per cent of local government expenditure is spent on maintaining depreciating assets, compared with less than [six] per cent for the States and less than [two] per cent for the Federal Government'.<sup>75</sup>

1.69 Local Government Finance Professionals Queensland were of the view that the current depreciation accounting standard compliance resulted 'in an overstatement of the expense and negatively impacts on a councils operating performance and financial sustainability forecasts'.<sup>76</sup>

1.70 The Country Mayors Association of NSW also commented that depreciation was adversely impacting councils' financial sustainability:

Local Councils are required to set funds aside for infrastructure maintenance / renewal, contributing significantly to the expenses column in their financials, while also being required to include depreciation for road and plant assets as an expense. This means that costs associated with maintaining capital items are

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<sup>71</sup> Grattan Institute, *Submission 74*, p. 13.

<sup>72</sup> Emeritus Professor Brian Dollery, *Submission 68*, p. 5.

<sup>73</sup> CPA Australia, *A guide to understanding the financial reports of local governments*.

<sup>74</sup> Central NSW Joint Organisation, *Submission 109*, p. 5; Kiama Municipal Council, *Submission 75*, p. 5; Country Mayors Association of NSW, *Submission 188*, p. 11; Murry River Council, *Submission 14*, p. 6.

<sup>75</sup> Local Government Association of Queensland, *Submission 257*, p. 37.

<sup>76</sup> Local Government Finance Professionals Queensland, *Submission 244*, p. 11.

being counted twice and this impacts on perceived performance and borrowing capacity of a council.<sup>77</sup>

- 1.71 Kiama Municipal Council, the Central NSW Joint Organisation, Canberra Region Joint Organisation, Tablelands Regional Council, and Yass Valley Council were all of the view that depreciation provided no taxation offset or benefit for councils:

It is also accepted that in the commercial environment depreciation expenses are integral in determining the profit distribution through dividends, this however is not afforded to councils as there is no taxation offset or benefit.<sup>78</sup>

- 1.72 Local Government Finance Professionals Queensland recommended that Commonwealth and state governments consider adjustments to depreciation reporting requirements for local government:

...to allow depreciation expenses currently required to be recognised for grant funded and contributed assets to be excluded, should councils produce appropriate evidence that they do not plan on replacing those assets in the future.

This change would require discussion between the relevant stakeholders (state governments, Australian Accounting Standards Board, Audit Offices and state local government finance professional bodies to work towards an agreed approach).<sup>79</sup>

## Housing supplies

- 1.73 Housing supply is a significant challenge for LGAs nationally. Councils play an essential role in the long-term planning that underpins new housing developments to ensure community liveability and access to basic services.<sup>80</sup> Evidence received has focused on resourcing, planning and approval time frames.
- 1.74 Housing is in the top three issues faced by every regional LGA in WA; where there is little appetite from the private sector to get involved in the housing market in challenging locations.<sup>81</sup> In the NT, an increasing number of properties owned or managed by community housing providers is increasing pressure on local governments due to rate exemptions.<sup>82</sup> Whilst in SA, the 75 per cent rebate for community housing has become a burden for councils because the State Government has transferred a significant number of its properties to the not-for-profit

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<sup>77</sup> Country Mayors Association of NSW, *Submission 188*, p. 10.

<sup>78</sup> Kiama Municipal Council, *Submission 75*, p. 6; Central NSW Joint Organisation, *Submission 109*, p. 5; Canberra Region Joint Organisation, *Submission 258*, p. 3; Tablelands Regional Council, *Submission 235*, p. 2; Yass Valley Council, *Submission 164*, p. 3

<sup>79</sup> Local Government Finance Professionals Queensland, *Submission 244*, p. 11.

<sup>80</sup> Australian Local Government Association, *Submission 181*, p. 13.

<sup>81</sup> Mr Jamie Criddle, Chief Executive Officer, Shire of Chapman Valley, *Committee Hansard*, 28 August 2024, p. 19.

<sup>82</sup> City of Palmerston, *Submission 71*, p. 2.

sector in recent years.<sup>83</sup> Housing for key workers, teachers, healthcare and emergency service workers, in regional areas is also a significant issue.<sup>84</sup>

- 1.75 The national housing shortage is also exacerbating local government financial sustainability problems.<sup>85</sup> Only seven per cent of Australian Services Union survey respondents believed their council is appropriately resourced to deliver housing initiatives.<sup>86</sup> Housing is also routinely becoming part of a rural LGAs' service mix when market failure or service cuts by other levels of government result in declining local services.<sup>87</sup>
- 1.76 Councils are increasingly expected to fund the gap between the infrastructure contributions collected from developers and the current higher construction costs, which is directly impacting on their financial viability.<sup>88</sup>
- 1.77 Backlogs in planning, approval and construction times, is another significant inhibitor to building houses.<sup>89</sup> High levels of community expectations of infrastructure and housing delivery has also arguably led to an increase in poor quality supplies, an inexperienced workforce, which is resulting in unreasonable defects and works requiring remedial measures.<sup>90</sup>
- 1.78 Essential infrastructure elements also need to be in place before the construction of new homes can begin such as water, drainage, electricity and gas, and transportation. Councils rely on developer contributions to fund 'essential infrastructure, such as water and drainage, so new homes are habitable and connected to existing transport hubs.'<sup>91</sup>
- 1.79 Councils believed however that developer contributions were acting as an impediment to housing and infrastructure development and growth. Macedon Ranges Shire Council commented that developer contributions were not being distributed equally, adding:

...development and growth is not evenly distributed across our shires, and developer contributions are related to the area in which the greatest growth is happening—and rightly so, in terms of servicing those neighbourhoods. However, what that means is: an unequal or uneven distribution, in terms of the benefits, across shires, where other areas or wards may not be experiencing similar growth, and so you end up with ageing infrastructure that's rapidly degrading in

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<sup>83</sup> Grattan Institute, *Submission 74*, p. 12.

<sup>84</sup> Shire of Chapman Valley, *Submission 93*, p. 2.

<sup>85</sup> Regional Cities Victoria, *Submission 236*, p. 3.

<sup>86</sup> Australian Services Union, *Submission 140*, p. 5.

<sup>87</sup> Canberra Region Joint Organisation, *Submission 258*, p. 4.

<sup>88</sup> National Growth Areas Alliance, *Submission 228*, p. 4.

<sup>89</sup> Mr Nicholas Proud, CEO, Civil Contractors Federation, *Committee Hansard*, 15 August 2024, p. 2.

<sup>90</sup> City of Cockburn, *Submission 141*, p. 18.

<sup>91</sup> Standing Committee on Tax and Revenue, Inquiry into housing affordability and supply in Australia, *Submission 78*, p. 2.

some parts of our municipalities, where others are rapidly having investment due to developer contributions and rapid growth in housing.<sup>92</sup>

- 1.80 The Urban Development Institute of Australia reported in 2021 that the majority of lots expected to be delivered in NSW over the next eight years do not have the required infrastructure:
- ...76 per cent of expected lots needing sewer infrastructure and 70 per cent needing water. 50 per cent of lots anticipated to be delivered in the next [eight] years still require power, roads, or a combination of these. Non-infrastructure constraints, such as lengthy VPA negotiations and flooding impact 27 per cent of future supply, while 18 per cent of lots face additional issues, including biodiversity offsets and government agency decisions.<sup>93</sup>
- 1.81 The City of Greater Geelong noted that developer contributions do not cover the full cost of providing the necessary community infrastructure in newly developed areas.<sup>94</sup> Circular Head Council submitted that ‘a developer contribution scheme can act to impede or delay new housing supply if not clearly and consistently implemented so that the risk of unanticipated costs for developers (and therefore impact on margins) is minimised’.<sup>95</sup>
- 1.82 Local Government NSW identified that while ‘developer contributions provide some funding for capital costs in new development, they do not provide for recurrent costs, and councils are required to fund the ongoing maintenance, operating and depreciation expense associated with new infrastructure’.<sup>96</sup>
- 1.83 Other issues identified included economic cycles being out of sync with development cycles, a decrease in foreign investment and the need for essential infrastructure development to support new homes.<sup>97</sup>

## Environmental obligations

- 1.84 The Committee heard that LGAs are often the custodians of programs requiring compliance with a broad array of Commonwealth, state and NT legislation; ‘all of which bring with them a range of compliance costs and timing implications [which] are felt more acutely in regional and rural councils due to disparate communities with small populations and priorities for [those] communities’.<sup>98</sup>
- 1.85 LGAs play an essential role in the conservation and management of biodiversity and biosecurity for threatened species and are increasingly called upon to ensure

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<sup>92</sup> Ms Adele Drago-Stevens, Director, Corporate, Macedon Ranges Shire Council, *Committee Hansard*, 26 September 2024, pages. 2–3.

<sup>93</sup> Urban Development Institute of Australia (NSW), *Greenfield Land Supply pipeline Report*, June 2021, p. 5.

<sup>94</sup> City of Greater Geelong, *Submission 207*, p. 8.

<sup>95</sup> Circular Head Council, *Submission 12*, p. 3.

<sup>96</sup> Local Government NSW, *Submission 186*, p. 32.

<sup>97</sup> Mr Nicholas Proud, CEO, Civil Contractors Federation, *Committee Hansard*, 15 August 2024, pages 2–3.

<sup>98</sup> East Gippsland Shire Council, *Submission 162*, p. 10.

compliance with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), weed management and climate change regulations, ‘particularly with respect to illegal clearing of federally protected native vegetation and habitat’.<sup>99</sup>

- 1.86 Brisbane City Council highlighted the additional regulatory compliance burden in complying with the EPBC Act to undertake audits, investigations and enforcement to prevent impacts on the community and the environment.<sup>100</sup>
- 1.87 Regional, rural and remote councils ‘have large areas that are national parks, state forests or public reserves which are not rateable and yet must be serviced in terms of access roads, pest and weeds management, biodiversity protection and visitor experience enhancement’.<sup>101</sup>
- 1.88 In addition to compliance with environmental protection legislation, LGAs across Australia commented on increased community expectations for greater environmental conservation and sustainability, as well as a lack of resources and technical expertise, noting:
- an increased community demand for proactive responses to environmental conservation, and sustainability<sup>102</sup>
  - impacts on biodiversity and natural ecosystems are requiring local governments to develop and implement conservation strategies to protect local flora and fauna<sup>103</sup>
  - environmental obligations, such as managing natural resources, conservation, and climate change mitigation, often require significant financial resources and technical expertise<sup>104</sup>
  - the financial strain on local governments hinders their ability to effectively manage environmental challenges, particularly when accompanied by evolving rules and regulations<sup>105</sup>
  - councils need dedicated funding streams to support their environmental obligations and sustainable practices.<sup>106</sup>

## Climate adaptation management

- 1.89 Australia is experiencing ongoing changes to its weather and climate. The Bureau of Meteorology has observed an increase in the frequency of extreme heat events over land and in the oceans; heavy short-term rainfall events becoming more intense leading to flash flooding; an increase in extreme fire weather, and a longer fire

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<sup>99</sup> Campaspe Shire Council, *Submission 172*, p. 6.

<sup>100</sup> Councillor Fiona Cunningham, Civic Cabinet Chair, Finance and City Governance Committee, Brisbane City Council, *Committee Hansard*, 18 October 2024, pages 6–7.

<sup>101</sup> Canberra Region Joint Organisation, *Submission 258*, pages 9–10.

<sup>102</sup> City of Cockburn, *Submission 141*, p. 22.

<sup>103</sup> Municipal Association of Victoria, *Submission 97*, p. 21.

<sup>104</sup> West Wimmera Shire Council, *Submission 28*, p. 3.

<sup>105</sup> Western Queensland Alliance of Councils, *Submission 176*, p. 7.

<sup>106</sup> Mr David Arnold, Chief Executive Officer, Central Western Queensland Remote Area Planning and Development Board, *Committee Hansard*, 18 October 2024, p. 27.

season; and a continued decrease, on average, in cool season rainfall across southern and eastern Australia, which will likely lead to more drought.<sup>107</sup>

- 1.90 Across all LGAs, the average annual damages to council assets as a result of coastal flooding, inland flooding, bushfires, heatwaves, and severe storms are in the range of \$90–\$120 million.<sup>108</sup> The 2022 flood events in NSW, for example, ‘affected 98 out of 128 LGAs, damaged 15,000 homes and caused over \$5.1 billion of insured damages’.<sup>109</sup> According to a report by Natural Capital Economics, this is expected to increase to between \$210–\$300 million by 2050, and to between \$400–\$540 million by 2100.<sup>110</sup>
- 1.91 There was general agreement across most LGAs that mitigating the effects of climate related natural disasters and climate adaptation management was not only essential but also posed a significant financial cost. Local governments are at the forefront of climate change mitigation and adaptation, disaster response, and environmental protection; spending more on environmental protection than other government levels, but lacking resources and expertise to implement all necessary measures.<sup>111</sup>
- 1.92 Local governments face a widening resource gap, limiting their capacity to undertake essential climate change adaptation and mitigation work, which is critical to the sustainability of their communities.<sup>112</sup> The Committee heard that coastal LGAs do not have the financial capacity to meet adaptation challenges;<sup>113</sup> urban councils incur significant and increasing cost impacts in dealing with climate change adaptation and risk management;<sup>114</sup> and regional communities find themselves at the edge of change for climate change, natural disasters and transition while funding to local governments is limited.<sup>115</sup>
- 1.93 The costs of disaster management, including preparation, response, and recovery are increasing, and costs are uneven over space and time. Disasters and extreme weather events do not readily conform to budget processes.<sup>116</sup> The cost of post-disaster recovery has also shifted as the intensity of disasters is exacerbated by climate change.<sup>117</sup> Extreme weather events cause extensive damage to physical infrastructure (roads, coastal structures, and public buildings) leading to costly and extensive repairs disrupting services, including emergency response and waste management, which then diverts resources from other critical areas and puts

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<sup>107</sup> Bureau of Meteorology, *State of the Climate 2024*.

<sup>108</sup> Natural Capital Economics Pty Ltd, *Adaptive Community Assets. A report prepared for the Eastern Alliance for Greenhouse Action*, 22 March 2023, pages iii and 4.

<sup>109</sup> NSW Department of Planning, Housing and Infrastructure, *Submission 255*, p. 28.

<sup>110</sup> Natural Capital Economics Pty Ltd, *Adaptive Community Assets. A report prepared for the Eastern Alliance for Greenhouse Action*, 22 March 2023, pages iii and 4.

<sup>111</sup> Australian Local Government Association, *Submission 181*, pages 4 and 8.

<sup>112</sup> Victorian Greenhouse Alliances, *Submission 219*, p. 2.

<sup>113</sup> Councillor Sarah Race, *Submission 151*, p. 1.

<sup>114</sup> Merri-bek City Council, *Submission 60*, p. 5.

<sup>115</sup> Australian Rural Leadership Foundation, *Submission 208*, p. 2.

<sup>116</sup> La Trobe Climate Change Adaptation Lab, *Submission 41*, p. 4.

<sup>117</sup> Public Skills Australia, *Submission 118*, p. 3.



pressures on planned maintenance schedules.<sup>118</sup> This further impacts councils' ability to deliver projects and services in financially sustainable ways.<sup>119</sup>

- 1.94 With the scale and timeframes associated with managing climate adaptation measures, town planners and managers are attempting to design for an uncertain future while lacking funding for climate adaptation measures.<sup>120</sup>
- 1.95 As a result of these challenges, the Committee has been advised additional and continued funding is needed to assist local governments to undertake disaster resilience and risk reduction initiatives to manage the physical and social impacts of disasters caused by climate change and natural disasters.<sup>121</sup>

## Skills shortages

- 1.96 Local Government Workforce Skills and Capability surveys conducted in WA, NSW and SA noted skills shortages across several varied occupations.
- 1.97 A 2022 survey in WA found that 90 per cent of respondent reported that they were experiencing skills shortages in 2021–22, compared to the 47 per cent in 2018.<sup>122</sup> The top professional occupations experiencing skill shortages in 2020–21, according to the survey, were building surveyors, risk managers, engineers and town planners affecting 21–24 per cent of councils, while trade occupations, customer service workers, labourers and truck drivers experienced the greatest shortages affecting 29–33 per cent of local governments.<sup>123</sup>
- 1.98 A survey conducted in NSW in 2022 found that 'over 91 [per cent] of surveyed council respondents reported skills shortages, with 66 [per cent] of respondents saying that project delivery had been impacted or delayed by vacancies, skills shortages, skills gaps or training needs'.<sup>124</sup> The top occupations experiencing skill shortages included engineers, urban and town planners, building surveyors, project managers, labourers, information and communication technologies, engineers, urban and town planners, building surveyors and mechanical tradespersons.<sup>125</sup>
- 1.99 The 2022 SA survey found similarly that:
- ...nine out of every 10 Australian councils are facing jobs and skills shortages, with engineers, planners, building surveyors and environmental health officers all in high demand. Due to these skills shortages, councils resort to recruiting less skilled applicants for engineering, urban and town planning, building surveying and supervisor and team leader roles. Unavoidably, this has had negative

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<sup>118</sup> District Council of Streaky Bay, *Submission 231*, p. 2.

<sup>119</sup> City of Onkaparinga, *Submission 69*, p. 2.

<sup>120</sup> Australian Coastal Councils Association, *Submission 58*, p. 9.

<sup>121</sup> Local Government Association of Queensland, *Submission 257*, p. 30.

<sup>122</sup> Western Australian Local Government Association, *Submission 96*, p. 12.

<sup>123</sup> Western Australian Local Government Association, *Submission 96*, p. 12.

<sup>124</sup> NSW Department of Planning, Housing and Infrastructure, *Submission 255*, p. 31.

<sup>125</sup> NSW Department of Planning, Housing and Infrastructure, *Submission 255*, p. 31.

repercussions for local government productivity. Often councils can't afford to pay remuneration that's comparable to the private sector or other levels of government.<sup>126</sup>

1.100 As noted above, state and NT LGAs reported that they were experiencing skills shortages across a wide range of occupations. The majority commented that they were experiencing skills shortages for urban and town planners, engineers, building surveyors and inspectors, engineers, emergency planners, environmental health officers, asset managers, and human resource, healthcare, and childcare professionals. For councils experiencing extreme skills and labour shortages, a lack of skilled labour is becoming more evident when delivering complex infrastructure projects.<sup>127</sup>

1.101 The Committee received evidence on how the financial sustainability of LGAs are impacting the recruitment and retention of its workforce. Identified as a key driver was wage and benefits competition between LGAs, state and NT governments, and the private sector, making attracting and retaining suitably qualified workers challenging. For example, local governments are very good incubators in regional WA for developing skills, but they are unable to compete with the resource sector.<sup>128</sup>

1.102 Other drivers include:

- the inflationary environment on workforce/skilled labour particularly in the construction industry
- an ageing workforce
- job security
- rate capping making it challenging to offer competitive wages and invest in staff development
- trends towards contracting out essential local government services resulting in less job security for workers and lower wages, and
- a lack of infrastructure, such as housing, schools, retail, and social and medical services, in regional, rural and remote areas.<sup>129</sup>

1.103 For regional and rural and remote LGAs, skills shortages are exacerbated by an unwillingness of people to move there, and with salaries being less than those offered in metropolitan centres, there are no incentives available for people to take up employment.<sup>130</sup> Traditionally councils could offset a wage differential through higher job security and conditions, however in the current employment market staff

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<sup>126</sup> Local Government Association of South Australia, *Submission 95*, p. 21.

<sup>127</sup> Town of Port Hedland, *Submission 48*, p. 3; Mr Robert Potter, National Secretary, Australian Services Union, *Committee Hansard*, 25 July 2024, p. 15; Mr Michael Boyle, President, Civil Contractors Federation, *Committee Hansard*, 15 August 2024, p. 6.

<sup>128</sup> Mr Nick Sloan, Chief Executive Officer, Western Australian Local Government Association, *Committee Hansard*, 7 June 2024, p. 5.

<sup>129</sup> For example, see Mayor Kylie Boston, District Council of Grant, *Committee Hansard*, 27 September 2024, p. 21.

<sup>130</sup> Central Desert Regional Council, *Submission 9*, p. 1.

are prepared to sacrifice security for higher earning potential in either the private sector or with larger and better resourced councils in metropolitan and larger regional centres.<sup>131</sup>

- 1.104 Retaining skilled workers is increasingly challenging, and there is a lack of adequate workforce planning across the sector around what is needed to ensure new staff are brought on, whether it be through apprenticeship and traineeship programs or broader recruitment processes, which can be linking wider issues related to housing, community services, and access to TAFE/VET and higher education.<sup>132</sup>
- 1.105 To address workforce shortages, submitters put forward several possible solutions including:
- enhancing local training and education opportunities<sup>133</sup>
  - support skilled migration into regional capitals to match skill-based needs<sup>134</sup>
  - offering non-cash incentives to attract and retain staff<sup>135</sup>
  - provide additional training opportunities and funding to address skill gaps,<sup>136</sup> and
  - engaging local education and training providers (secondary schools and TAFE/VET providers)<sup>137</sup>
  - establishing a trainee and apprenticeship scheme and apprenticeship hub to improve jobs and skills, particularly in regional areas, and
  - establish a Fair Jobs Code for local government aimed at securing employment through placing limits on council's use of agency and labour hire employment.<sup>138</sup>

## Rate pegging

- 1.106 Rate pegging, a NSW and Victorian government policy, restricts the annual amount by which councils can raise rates without applying for a Special Rates Variation. Submitters noted how 'the financial sustainability of councils has been undermined by rate pegging'.<sup>139</sup>
- 1.107 The Warren Shire Council stated that 'rate pegging, is increasingly eroding any possibility of financially sustainable local government in NSW and risks the capacity of Council to deliver tailored, grassroots services to our community and properly deliver and maintain vital local infrastructure'.<sup>140</sup> Yass Valley Council stated that the

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<sup>131</sup> Canberra Region Joint Organisation, *Submission 258*, p. 4.

<sup>132</sup> Ms Samantha Batchelor, Tasmanian Coordinator, Australian Services Union, *Committee Hansard*, 25 September 2024, p. 29.

<sup>133</sup> Australian Services Union, *Submission 140*, p. 3.

<sup>134</sup> Regional Capitals Alliance of WA, *Submission 124*, p. 10.

<sup>135</sup> Western Queensland Alliance of Councils, *Submission 176*, p. 37.

<sup>136</sup> Western Queensland Alliance of Councils, *Submission 176*, p. 38.

<sup>137</sup> Torrens University Australia, *Submission 35*, p. 3.

<sup>138</sup> Australian Services Union, *Submission 140*, pages. 3-4.

<sup>139</sup> Local Government NSW, *Submission 186*, p. 7.

<sup>140</sup> Warren Shire Council, *Submission 81*, p. 5.

practice ‘constrains Council’s own source revenues from property rates and user chargers would need to be significantly increased to fill the gap’.<sup>141</sup> The Country Mayors Association of NSW suggested that rate pegging had resulted in much lower council rates; 41 per cent lower than the national average.<sup>142</sup>

- 1.108 However, Adjunct Professor Brian Dollery believed that abolishing rate pegging would not make many local councils financially sustainable as ‘many local councils in regional, rural or remote areas have neither the population nor rate base to generate sufficient funding for essential local services, new infrastructure and adequate staffing’.<sup>143</sup>

## Airport infrastructure

- 1.109 Over time, the ownership of many Australian Government airports has been steadily transferred to local governments. Between 1989 and 1993 local governments were given full management and financial responsibility for these airports. The Australian Airports Association noted that ‘under their transfer deeds, local governments are obliged to continue owning and operating these aerodrome facilities unless they receive permission from the Australian Government to either close or privatise these airports’.<sup>144</sup> There are 200 regional and rural airports owned and operated by councils across Australia with more than half of all local governments in rural areas responsible for an airport or aerodrome in some form.<sup>145</sup>
- 1.110 The Australian Local Government Association and Institute of Public Works Engineering Australasia’s 2024 State of the Assets report stated that Australia’s airports and aerodromes were either in poor condition or have poor function or capacity.<sup>146</sup> Key challenges included regional airports ‘operating runways and infrastructure that is 70+ years old, with substantial upgrades needed to meet modern aviation safety standards’ and regional airports have negative operating margins, and rely ‘on local government or other financial assistance to cover their operating, maintenance and upgrading costs’.<sup>147</sup>
- 1.111 Complying with aviation regulatory reforms are changing infrastructure and service delivery obligations for local governments that own or operate airports.<sup>148</sup> The Australian Airports Association highlighted a number of challenges including:

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<sup>141</sup> Yass Valley Council, *Submission 164*, p. 2.

<sup>142</sup> Country Mayors Association of NSW, *Submission 188*, p. 6.

<sup>143</sup> Adjunct Professor Brian Dollery, *Submission 68*, p. 5.

<sup>144</sup> Australian Airports Association, *Submission 259*, p. 2.

<sup>145</sup> Institute of Public Works Engineering Australasia and Australian Local Government Association, *2024 National State of the Assets Report*, July 2024, p. 6; Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Submission 38*, p. 10.

<sup>146</sup> Institute of Public Works Engineering Australasia and Australian Local Government Association, *2024 National State of the Assets Report*, July 2024, p. 4.

<sup>147</sup> Institute of Public Works Engineering Australasia and Australian Local Government Association, *2024 National State of the Assets Report*, July 2024, p. 40.

<sup>148</sup> Australian Airports Association, *Submission 259*, p. 4.

- new regulatory requirements for all ‘certified’ aerodromes to review their practices, facilities, and manuals to ensure they reflect the new standards required significant effort by local governments to ensure compliance, often coming at a major cost in time and money to councils and airports
- aviation security reforms for some local governments increased costs of airport operations and added an additional compliance burden
- heavier newer aircraft, decarbonisation of domestic aviation and climate adaptation management are placing intensive demands on airport infrastructure.<sup>149</sup>

1.112 Kimberley Regional Council identified a number of key issues that they believed airports faced including: ‘low annual passenger movements; limited opportunities for diversified revenue streams; limited capacity to borrow funds; limited ability to attract and retain highly qualified staff; ageing airport infrastructure; high operational costs for aviation security screening; high cost of doing business due to remoteness.’<sup>150</sup> They added that competitive funding was making it difficult to manage and implement critical upgrades and that regional and remote airports had a higher expenditure compared to major airports and major regional airports (12 per cent of total expenditure, compared to about four per cent).<sup>151</sup>

1.113 The Rural City of Wangaratta stated that there was no Australian Government support for the essential service of their aerodrome which was required to ensure ongoing maintenance and development.<sup>152</sup> The Australian Local Government Association stated that ‘most councils do not have the capability or capacity to raise the necessary funding for airports through their operational revenue’.<sup>153</sup>

## Additional concerns

1.114 Submitters also raised varied concerns that they believed were placing additional financial pressure on councils including: the indexation freeze on Financial Assistance Grants; the Commonwealth distribution formula; unwanted infrastructure added to councils’ portfolios through election commitments; transitioning and hosting grid-scale renewable energy projects.

1.115 The Grattan Institute noted that the ‘combined impact of the indexation freeze and [consumer price] indexation has led to a funding gap in 2023 of close to \$600 million’.<sup>154</sup> The Victorian Grants Commission estimated that ‘rural and regional councils have foregone \$125 million in revenue in the five years since the indexation was paused’.<sup>155</sup>

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<sup>149</sup> Australian Airports Association, *Submission 259*, p. 4.

<sup>150</sup> Kimberley Regional Council, *Submission 123*, p. 18.

<sup>151</sup> Kimberley Regional Council, *Submission 123*, p. 19.

<sup>152</sup> Rural City of Wangaratta, *Submission 125*, p. 7.

<sup>153</sup> Australian Local Government Association, *Submission 181*, p. 36.

<sup>154</sup> Grattan Institute, *Submission 74*, p. 5.

<sup>155</sup> Baw Baw Shire Council, *Submission 183*, p. 17.

- 1.116 The Northern Beaches Council stated that the ‘indexation method ([consumer price index] and population growth) does not recognise the cost pressures on councils, and this gap was further widened by the [three]-year indexation freeze on the Financial Assistance Grant from 2014–15 to 2016–17’.<sup>156</sup>
- 1.117 Local Government Professionals Australia suggested that the Commonwealth Government should address grant funding lost during the 2014–15 indexation freeze.<sup>157</sup>
- 1.118 Kiama Municipal Council’s submission stated that ‘assets are added to councils’ portfolios, due to growth driven by communities, and election commitments, but no grants provided by State and Federal government for maintaining the asset/depreciation’.<sup>158</sup>
- 1.119 The Shire of Cuballing believed that discretionary funds and grants programs were being ‘allocated to election commitments rather than deserving projects with an identified need, business case and matching funding in a safe opposition electorate’.<sup>159</sup>
- 1.120 The Canberra Region Joint Organisation noted an additional financial burden placed on councils from election commitments:
- These commitments are made following requests from the community with little consultation with council, particularly where the government changes. Generally, these assets (or liabilities) are not income-generating however the depreciation expense continues to hit the bottom lines of councils.<sup>160</sup>

## Other inquiries and reviews

- 1.121 Over the past two years, the state governments of Victoria, NSW and Tasmania have undertaken inquiries into their respective local governments:
- Parliament of NSW: Inquiry into the ability of local governments to fund infrastructure and services<sup>161</sup>
  - Parliament of Victoria: Inquiry Local Government funding and services<sup>162</sup>
  - Tasmanian Government: Future of Local Government Review.<sup>163</sup>

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<sup>156</sup> Northern Beaches Council, *Submission 117*, p. 2.

<sup>157</sup> Local Government Professionals Australia, *Submission 168*, p. 3.

<sup>158</sup> Kiama Municipal Council, *Submission 75*, p. 6.

<sup>159</sup> Shire of Cuballing, *Submission 46*, p. 5.

<sup>160</sup> Canberra Region Joint Organisation, *Submission 258*, p. 3.

<sup>161</sup> Parliament of NSW, ‘Ability of local governments to fund infrastructure and services’, <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3040>, accessed 9 December 2024.

<sup>162</sup> Parliament of Victoria, ‘Inquiry into Local Government funding and services’, <https://www.parliament.vic.gov.au/localgovernmentfunding>, accessed 9 December 2024.

<sup>163</sup> Tasmanian Department of Premier and Cabinet, *The Future of local government review, Final Report*, October 2023.

1.122 Evidence gathered from the state inquiries serves to enhance and corroborate the evidence received for this inquiry to date, providing a more comprehensive understanding of the issues at hand as the Committee works towards presenting its final report.

## Committee comment

1.123 The role of local governments in Australia has changed significantly over time. Councils must navigate complex regulatory environments, manage limited financial resources, and address diverse and sometimes competing community needs and expectations.

1.124 Ensuring financial sustainability is a key challenge for LGAs in this evolving environment. Funding for local governments comes from various sources, including taxes in the form of rates, charges for the sale of goods and services, and grants from Commonwealth, state and NT governments. Councils must balance their budgets while maintaining service delivery and investing in infrastructure.

1.125 Submitters put forward wide ranging recommendations aimed at improving the sustainability of local governments. Given the significant number of recommendations put forward to this inquiry by participants, it is challenging to list them all here. A brief overview of some of the key recommendations made by LGAs includes:

- review the Financial Assistance Grants program including:
  - minimum Financial Assistance Grants restored to one percent of Commonwealth taxation revenue
  - remove fixed co-contribution and short delivery timeline requirements of grants
  - set the duration of funded programs a minimum of three to five years to enable for delivery stability and quality
  - Commonwealth Government establish a new allocative, permanent funding program for local governments
  - increase Financial Assistance Grant funding for smaller regional, rural and remote councils based on relative need
- review the Intergovernmental Agreement on Federal Financial Relations
- ensure the allocation of grants are consistent with horizontal equalisation between councils in all jurisdictions, reflecting the different expenditure needs and revenue capacities of councils in different states
- the Commonwealth Government consider the role local governments play, and the appropriateness of funding made available to First Nations councils in achieving the objectives of the National Agreement on Closing the Gap
- address skills shortages through:

- increase programs that will improve labour availability such as upskilling, retraining, skilled migration and re-evaluate migration policy to enable access to select highly skilled experts
- develop mechanisms for public/private partnerships to address service gaps
- incentivise workers to relocate to local government regional, rural and remote areas
- develop education pathways to promote local government specific skills for regional areas
- review international best practice of workforce incentive programs and potential application in the Australian context
- consider local governments' role in National Cabinet and ministerial forums
- consider developing a new tripartite agreement between all three levels of government, that ends the cost shifting onto local governments
- consider making councils eligible for Fringe Benefit Tax exemptions and concessions
- the Commonwealth Government to amend the *Fair Work Act 2009* (Cth) to regulate the provision of labour hire services by national system employers to state system local governments
- the Department of Defence and other Commonwealth agencies to contribute to infrastructure required to service their operations
- develop a national working group to proactively prepare and mitigate natural disasters and climate change impacts, with funding for local programs.

1.126 The Committee is thoroughly reviewing the substantial evidence it has received to date and will announce its final recommendations in due course.

1.127 The Committee wishes to express its appreciation to all the LGAs, councils, shires, Commonwealth, state and NT governments and their respective departments, peak bodies, the Australian Services Union, the United Services Union, academics, organisations and individuals who have not only taken the time to provide a submission to this inquiry but also provided their valuable insights and expertise at public hearings.

**Mr Luke Gosling OAM MP**  
**Chair**  
**13 February 2025**







# A. Submissions

- 1 Mr Kevin Brooks
- 2 Kim Riley
- 3 Ms Susanne Martain
- 4 Mr John O'Donnell
- 5 Northern and Yorke LGA
- 6 *Name Withheld*
- 7 Queensland Water Directorate
- 8 Mr Jacob Heremaia
- 9 Central Desert Regional Council
- 10 Mosman Municipal Council
- 11 Dr Mark Chou
- 12 Circular Head Council
- 13 Berrigan Shire Council
- 14 Murray River Council
- 15 Hay Shire Council
- 16 City of Holdfast Bay
- 17 Albury City Council
- 18 Wakefield Regional Council
- 19 Lockhart Shire Council
- 20 Cootamundra-Gundagai Regional Council
- 21 Livingstone Shire Council
- 22 Coorong District Council

- 23** Mr James Beale
- 24** Upper Hunter Shire Council
- 25** Shire of Boyup Brook
- 26** City of Darwin
- 27** Central Goldfields Shire Council
- 28** West Wimmera Shire Council
- 29** Indigo Shire Council
- 30** Narromine Shire Council
- 31** Coolamon Shire Council
- 32** City of Tea Tree Gully
- 33** Glen Eira City Council
- 34** Maroondah City Council
- 35** Torrens University Australia
- 36** Murrumbidgee Council
- 37** MidCoast Council
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- 40** City of Victor Harbor
- 41** La Trobe Climate Change Adaptation Lab
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- 43** City of Greater Geraldton
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- 45** Nova Ratio
- 46** Shire of Cuballing
- 47** Warrnambool City Council
- 48** Town of Port Hedland
- 49** South Gippsland Shire Council
- 50** City of Charles Sturt
- 51** Queensland Audit Office
- 52** Gunnedah Shire Council
- 53** Griffith City Council
- 54** Shire of Narrogin
- 55** *Name Withheld*
- 56** Confidential
- 57** North Sydney Council
- 58** Australian Coastal Councils Association Inc
- 59** Shire of Dumbleyung
- 60** Merri-bek City Council
- 61** City of Stonnington
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- 62** Logan City Council
- 63** *Name Withheld*
- 64** Jobs and Skills Australia
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- 65** City of Mount Gambier
- 66** City of Wanneroo
- 67** Shire of Wyndham East Kimberley

- 68** Prof. Brian Dollery
- 69** City of Onkaparinga
- 70** City of Whyalla
- 71** City of Palmerston
- 72** City of Newcastle
- 73** Yarra Ranges Council
- 74** Grattan Institute
- 75** Kiama Municipal Council
- 76** Shire of Shark Bay
- 77** Corangamite Shire Council
- 78** Brisbane City Council
- 79** Break O'Day Council
- 80** Always Thinking Advisory
- 81** Warren Shire Council
- 82** Byron Shire Council
- 83** Narrandera Shire Council
- 84** Shire of Wagin
- 85** Murchison Shire
- 86** Local Government Association of the Northern Territory
- 87** Shire of Esperance
- 88** Shire of Morawa
- 89** Port Macquarie Hastings Council
- 90** A New Approach
- 91** Australian Flexible Pavement Association
- 92** Local and Independent News Association
- 93** Shire of Chapman Valley

- 94** Shire of Kellerberrin
- 95** LGASA
- 96** WA Local Government Association
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- 99** City of Moreton Bay
- 100** City of Palmerston
- 101** City of Kwinana
- 102** LG Consulting Group
- 103** Mr Martin Duke
- 104** Regional Development Australia Yorke and Mid North
- 105** Knox City Council
- 106** Yarriambiack Shire Council
- 107** Australian Logistics Council
- 108** Queanbeyan-Palerang Regional Council
- 109** Central NSW Joint Organisation
- 110** Shire of Augusta Margaret River
- 111** Wheatbelt East Regional Organisation of Councils Inc.
- 112** Campbelltown City Council
- 113** Northern Sydney Regional Organisation of Councils
- 114** Shire of Victoria Plains
- 115** Wodonga City Council
- 116** Kempsey Shire Council
- 117** Northern Beaches Council

- 118** Public Skills Australia
- 119** City of Kalgoorlie-Boulder
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- 121** Government of South Australia
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- 129** Lake Macquarie City Council
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- 131** Sutherland Shire Council
- 132** Shoalhaven City Council
- 133** Rockhampton Regional Council
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- 135** Tweed Shire Council
- 136** Suicide Prevention Australia
- 137** Loddon Shire Council
- 138** Rural Councils Victoria
- 139** Snowy Valley Council
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- 141** City of Cockburn
- 142** District Council of Yankalilla
- 143** Greater Ballarat Alliance of Councils
- 144** Victorian Local Governance Association
- 145** Mildura Rural City Council
- 146** Federation Council
- 147** Melbourne 9
- 148** Hawkesbury City Council
- 149** Inverell Shire Council
- 150** Chamber of Minerals & Energy of Western Australia
- 151** Mrs Sarah Catherine Race
- 152** Institute of Public Works Engineering Australasia
- 153** Ms Leila Kasprzak
- 154** FinPro
- 155** Regional Development Australia Tasmania
- 156** Weddin Shire Council
- 157** Moonee Valley City Council
- 158** Mornington Peninsula Shire Council
- 159** Dr Ed Wensing
- 160** Shire of Gnowangerup
- 161** Queensland Local Government Grants Commission
- 162** East Gippsland Shire Council
- 163** Woollahra Council
- 164** Yass Valley Council
- 165** Yarra City Council
- 166** JLT Public Sector



- 167** Shire of Yilgarn
- 168** Local Government Professionals Australia, NSW
- 169** Hindmarsh Shire Council
- 170** Local Government Professionals WA
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- 188** Country Mayors Association of NSW
- 189** Mr Darren Williams

- 190** Far North Queensland Regional Organisation of Councils
- 191** Regional Development Australia Sydney
- 192** North Burnett Regional Council
- 193** Australia Post
- 194** Loxton Waikerie District Council
- 195** GrainGrowers Limited
- 196** District Council of Robe
- 197** Penrith Council
- 198** National Rural Health Alliance
- 199** Surf Coast Shire Council
- 200** Junee Shire Council
- 201** Isaac Regional Council
- 202** Macedon Ranges Shire Council
- 203** Cradle Coast Natural Resource Management Cradle Coast Authority
- 204** Greater Good Co
- 205** Torres Strait Island Regional Council
- 206** Shire of Serpentine Jarrahdale
- 207** City of Greater Geelong
- 208** Australian Rural Leadership Foundation
- 209** Redland City Council
- 210** Mansfield Shire Council
- 211** Copper Coast Council
- 212** Australian Library and Information Association
- 213** Shire of Yalgoo
- 214** Tatiara District Council
- 215** Latrobe City Council

- 216** The District Council of Coober Pedy
- 217** Murrindindi Shire Council
- 218** Western Australian Local Government Grants Commission
- 219** Central Victorian Greenhouse Alliance
- 220** Buloke Shire council
- 221** City of Greater Bendigo
- 222** Goulburn Mulwaree Council
- 223** Shellharbour City Council
- 224** Dungog Shire Council
- 225** Parkes Shire Council
- 226** Bega Valley Shire Council
- 227** City of Gold Coast
- 228** National Growth Areas Alliance
- 229** Swan Hill Rural City Council
- 230** Moyne Shire Council
- 231** District Council of Streaky Bay
- 232** Bland Shire Council
- 233** Wollongong City Council
- 234** Hepburn Shire Council
- 235** Tablelands Regional Council
- 236** Regional Cities Victoria
- 237** Shire of Narembeen
- 238** Narrabri Shire Council
- 239** Wollondilly Shire Council
- 240** Shire of Carnarvon
- 241** Australian Medical Association

- 242** Insurance Council of Australia
- 243** Central Highlands Regional Council
- 244** Local Government Finance Professionals Qld
- 245** The Real Republic Australia
- 246** Stephen Bali MP
- 247** Civil Contractors Federation Australia Ltd
- 248** ACT Government
- 249** Amazon Web Services
- 250** Local Government Association of Tasmania
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- 251** City of Ballarat
- 252** City of Adelaide
- 253** Bathurst Regional Council
- 254** District Council of Grant
- 255** NSW Government Department of Planning, Housing and Infrastructure
- 256** Mount Barker District Council
- 257** Local Government Association of Queensland
- 258** Canberra Region Joint Organisation
- 259** Australian Airports Association
- 260** Mid Murray Council
- 261** Broken Hill City Council
- 262** Australian Small Business and Family Enterprise Ombudsman
- 263** Cardinia Shire Council
- 264** JFA Purple Orange
- 265** Tasmanian Government
- 266** Northern Tasmanian Alliance for Resilient Councils

- 267** Northern Territory Government
- 268** Regional Capitals Australia
- 269** Murraylands and Riverland Local Government Association
- 270** Destination Riverina Murray
- 271** Queensland Farmers' Federation
- 272** Shire of Pingelly
- 273** Syngensis and Polypave
- 274** Queensland Government Department of Housing, Local Government, Planning and Public Works
- 275** District Council of Tumby Bay
- 276** One Gippsland
- 277** Department of Climate Change, Energy, the Environment and Water
- 278** Department of Finance
- 279** Shire of Derby / West Kimberley
- 280** Graham Sansom
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- 281** Local Government Elected Members Association Inc
- 282** Department of Health and Aged Care
- 282.1 Supplementary to submission 282
- 283** Indigenous Business Australia
- 284** Essential Services Commission of South Australia
- 285** Regional Australia Institute
- 286** Flinders Council
- 287** Sea Swift Pty Ltd



## **B. Public hearings**

**Thursday 30 May 2024**

**Canberra**

**Department of Infrastructure, Transport, Regional Development, Communications and the Arts**

- Mr John Bowdery, Acting Director, Strategy and Policy (Local Government), Regional Intelligence and Local Government Branch
- Ms Clare Chapple, First Assistant Secretary, Regional Development and Local Government Branch
- Mr Michael Gregory, Acting Assistant Secretary, Local Government, Regional Intelligence and Data Branch
- Mr David Mackay, Deputy Secretary

**Friday 7 June 2024**

**Canberra**

**Local Government Association of South Australia**

- Mayor Dean Johnson, President

**Western Australia Local Government Association**

- Councillor Karen Chappel, President
- Mr Nick Sloan, Chief Executive Officer
- Mr Daniel Thomson, Manager, Economics

**Municipal Association of Victoria**

- Mr Domenic Isola, Director, Corporate Services

**Local Government Association of the Northern Territory**

- Mr Peter Morris, Advocacy and Policy Adviser

### **Department of Employment and Workplace Relations**

- Ms Renae Houston, First Assistant Secretary
- Ms Kirsty Leslie, Acting Assistant Secretary, Jobs and Skills Australia
- Mr David Turvey, First Assistant Secretary, Jobs and Skills Australia

### **Department of Climate Change, Energy, the Environment and Water**

- Ms Cathryn Geiger, Acting Head of Division, Climate Change Policy, Adaptation and Risk Division
- Mr Chris Johnston, Branch Head, Climate Active, Risks and Disclosures Branch
- Ms Kathryn Smith, Branch Head, National Adaptation Policy Office

### **Department of Finance**

- Ms Tracey Carroll, First Assistant Secretary, Governance and Grants Division, Governance and Resource Management
- Mr Cameron Jose, Assistant Secretary, Commercial Policy and Advice Branch, Commercial Investments Division, Commercial Group
- Ms Louise Sasaki, Assistant Secretary, Infrastructure, Communications, and Agriculture Branch, Industry, Education and Infrastructure Division, Budget Group

## **Thursday 27 June 2024**

### **Canberra**

#### **Australian Local Government Association**

- Ms Amy Crawford, Chief Executive Officer
- Councillor Linda Scott, President

## **Thursday 4 July 2024**

### **Canberra**

#### **Department of Health and Aged Care**

- Ms Trisha Garrett, First Assistant Secretary, Service Delivery Division, Ageing and Aged Care Group

# Thursday 25 July 2024

## Canberra

### Local Government Association of Queensland

- Councillor Matt Burnett, Acting President
- Ms Lucy Greene, Lead, Intergovernmental Relations
- Mr Nathan Ruhle, Manager, Intergovernmental Relations
- Ms Alison Smith, Chief Executive Officer

### Local Government Association of Tasmania

- Mr Dion Lester, Chief Executive Officer
- Mr Michael Tucker, President

### Local Government New South Wales

- Mr David Reynolds, Chief Executive
- Mrs Darriea Turley, President

### Australian Services Union

- Mr Robert Potter, National Secretary

### Northern and Yorke Local Government Association

- Mr Simon Millcock, Chief Executive Officer

### Torrens University Australia

- Dr Roslyn Cameron, Professor and Director, Centre for Organisational Change and Agility

### Always Thinking Advisory

- Mr Peter Tegart, Partner

### United Services Union

- Mr Stephen Hughes, Northern Manager
- Mr Graeme Kelly, OAM, General Secretary
- Mr Daniel Papps, Manager, Industrial, Rules, Governance and Compliance



### **Private Capacity**

- Professor Brian Dollery

## **Thursday 15 August 2024**

### **Canberra**

#### **Civil Contractors Federation Australia Ltd**

- Mr Michael Boyle, President
- Mr Nicholas Proud, Chief Executive Officer

## **Thursday 22 August 2024**

### **Canberra**

#### **UTS Institute for Public Policy and Governance**

- Adjunct Professor Graham Sansom

## **Friday 23 August 2024**

### **Canberra**

#### **City of Darwin**

- Mr Peter Pangquee, Deputy Lord Mayor
- Ms Simone Saunders, Chief Executive Officer

#### **City of Palmerston**

- Mr Luccio Cercarelli, Chief Executive Officer
- Mrs Athina Pascoe-Bell, Mayor

#### **Central Desert Regional Council**

- Mr Leslie Manda, Chief Executive Officer

#### **Alice Springs Town Council**

- Mr Matthew Paterson, Mayor
- Mr Andrew Wilsmore, Chief Executive Officer

# **Wednesday 28 August 2024**

## **West Perth**

### **City of Kwinana**

- Mr Wayne Jack, Chief Executive Officer

### **City of Cockburn**

- Mr Daniel Arndt, Acting Chief Executive Officer

### **City of Wanneroo**

- Mrs Linda Aitken, Mayor
- Mr Bill Parker, Chief Executive Officer

### **Shire of Augusta Margaret River**

- Ms Melanie May Stevens, Director of Corporate and Customer Services

### **Shire of Gnowangerup**

- Mrs Kate O'Keeffe, Shire President
- Mr David Nicholson, Chief Executive Officer

### **City of Greater Geraldton**

- Mr Ross McKim, Chief Executive Officer

### **Shire of Yalgoo**

- Mr Ian Holland, Chief Executive Officer

### **Shire of Chapman Valley**

- Mr Jamie Criddle, Chief Executive Officer

### **City of Kalgoorlie-Boulder**

- Mr Andrew Brien, Chief Executive Officer

### **Shire of Kellerberrin**

- Mr Raymond Griffiths, Chief Executive Officer

### **Shire of Yilgarn**

- Mr Nic Warren, Chief Executive Officer

### **Town of Port Hedland**

- Ms Shanna Crispin, Manager of Public Affairs
- Mr Stephen Leeson, Director of Corporate Services

### **Shire of Shark Bay**

- Mrs Cheryl Cowell, Shire President

### **Shire of Exmouth**

- Mr Matthew Nikkula, Shire President

### **Shire of Wyndham East Kimberley**

- Mr David Menzel, Shire President
- Mr Vernon Lawrence, Chief Executive Officer

### **Shire of Derby / West Kimberley**

- Mr Neil Hartley, Director of Strategic Business
- Mr Peter McCumstie, Shire President

### **Kimberley Regional Group and Regional Capital Alliance of Western Australia**

- Mr Paul Rosair, Executive Officer

### **City of Bunbury**

- Mr Jaysen Miguel, Mayor

## **Wednesday 25 September 2024**

### **Launceston**

#### **City of Launceston Council**

- Mr Michael Newby, Chief Infrastructure Officer
- Mr Nathan Williams, Chief Financial Officer

#### **George Town Council**

- Mr Shane Power, General Manager

#### **Flinders Council**

- Mr Warren Groves, General Manager

- Ms Rachel Summers, Mayor

#### **Break O'Day Council**

- Mr John Brown, General Manager

#### **Circular Head Regional Council**

- Mrs Vanessa Adams, General Manager
- Mr Gerard Blizzard, Mayor

#### **Australian Services Union**

- Ms Corinne Ball, Delegate
- Ms Samantha Batchelor, Tasmanian Coordinator
- Mr Mischa Pringle, Delegate
- Ms Jo Swan, Delegate

## **Thursday 26 September 2024**

### **Wallan**

#### **Mitchell Shire Council**

- Ms Mary Agostino, Director, Advocacy and Communities
- Mr Brett Luxford, Chief Executive Officer

#### **Macedon Ranges Shire Council**

- Ms Adele Drago-Stevens, Director, Corporate
- Mr Bernie O'Sullivan, Chief Executive Officer

#### **Wyndham City Council**

- Mr Stephen Wall, Chief Executive Officer

#### **Melbourne 9**

- Mr Dale Dickson, Chief Executive Officer, City of Stonnington
- Ms Helen Sui, Chief Executive Officer, City of Moonee Valley

#### **Yarra City Council**

- Ms Sue Wilkinson, Chief Executive Officer

### **City of Greater Bendigo**

- Mr Andrew Cooney, Chief Executive Officer

### **Mildura Rural City Council**

- Mr Martin Hawson, Chief Executive Officer
- Mr Mark McMillan, Manager Financial Services

### **Moyne Shire Council**

- Mr Ed Small, Director, Corporate and Governance Services

### **Mornington Peninsula Shire Council**

- Mr John Baker, Chief Executive Officer
- Mr Bulent Oz, Chief Financial Officer

### **Rural City of Wangaratta**

- Ms Sarah Brindley, Director, Corporate and Leisure
- Mrs Anthea Sloan, Service Development Manager

### **Murrindindi Shire Council**

- Ms Livia Bonazzi, Chief Executive Officer

### **East Gippsland Shire Council**

- Ms Sarah Johnston, General Manager, Business Excellence
- Ms Fiona Weigall, Chief Executive Officer

## **Friday 27 September 2024**

### **Adelaide**

#### **City of Tea Tree Gully**

- Mr Ryan McMahon, Chief Executive Officer
- Mr Justin Robbins, General Manager, Strategy and Finance

#### **Mount Barker District Council**

- Mr Alex Oulianoff, General Manager, Corporate Services

### **Mid Murray Council**

- Mrs Simone Bailey, Mayor
- Mr Ben Scales, Chief Executive Officer

### **Southern Mallee District Council**

- Mr Lachlan Miller, Chief Executive Officer
- Mr Ron Valentine, Mayor

### **District Council of Robe**

- Ms Natalie Traeger, Chief Executive Officer

### **City of Mount Gambier**

- Mayor Lynette Martin
- Mrs Sarah Philpott, Chief Executive Officer

### **District Council of Grant**

- Mayor Kylie Boston
- Mr Darryl Whicker, Chief Executive Officer

### **Kingston District Council**

- Mr Ian Hart, Chief Executive Officer

### **Whyalla City Council**

- Mr Justin Commons, Chief Executive Officer
- Ms Kathy Jarrett, Director, Corporate Services
- Mr Phill Stone, Mayor

### **Northern and Yorke Local Government Association**

- Mr Simon Millcock, Chief Executive Officer

### **Essential Services Commission of South Australia**

- Mr George Kamencak, Executive Director, Monitoring and Evaluation
- Mr Adam Wilson, Chief Executive Officer

## **Thursday 10 October 2024**

### **Canberra**

#### **Department of Premier and Cabinet, Tasmania**

- Mr Isaac Dalla-Fontana, Senior Policy Analyst, Office of Local Government
- Mr Matthew Healey, Acting Deputy Secretary, Strategy and Delivery
- Mr Michael Mogridge, Acting Executive Director, Local Government, Office of Local Government
- Mr Luke Murphy-Gregory, Acting Director, Local Government Reform, Office of Local Government

## **Thursday 17 October 2024**

### **Cairns**

#### **Tablelands Regional Council**

- Ms Erica Bowden, Manager, Finance
- Mr Angelo Finocchiaro, Executive Manager, Economic Development
- Mayor Rod Marti

#### **Cairns Regional Council**

- Ms Lisa Whitton, Chief Financial Officer

#### **Napranum Aboriginal Shire Council**

- Mr Peter O'May, Chief Executive Officer

#### **Torres Shire Council**

- Ms Elsie Seriat, Mayor
- Mrs Dalassa Yorkston, Chief Executive Officer

#### **Weipa Town Authority**

- Mrs Jaime Gane, Chair

#### **Far North Queensland Regional Organisation of Councils**

- Ms Darlene Irvine, Chief Executive Officer

## **The Services Union**

- Mrs Kathy Cochran, Union Delegate
- Mr Glenn Desmond, Regional Organiser
- Mrs Jenny Elphinstone, Local Delegate

# **Friday 18 October 2024**

## **Beaudesert**

### **Logan City Council**

- Mr Jon Raven, Mayor

### **Brisbane City Council**

- Councillor Fiona Cunningham, Civic Cabinet Chair, Finance and City Governance Committee
- Mr Mark Russell, Chief Finance Officer

### **Scenic Rim Regional Council**

- Mr David Keenan, Chief Executive Officer
- Mr Oliver Pring, General Manager, Council Sustainability, and Chief Financial Officer
- Councillor Tom Sharp, Mayor

### **Toowoomba Regional Council**

- Mr Mike Brady, General Manager
- Mr Geoff McDonald, Mayor

### **Banana Shire Council**

- Mr Thomas Upton, Chief Executive Officer

### **North Burnett Regional Council**

- Mr Craig Matheson, Chief Executive Officer

### **Western Queensland Alliance of Councils**

- Mr David Arnold, Chief Executive Officer, Central Western Queensland Remote Area Planning and Development Board
- Councillor Janene Fegan, Deputy Chair, North West Queensland Regional Organisation of Councils



- Mr Greg Hoffman, Executive Director, North West Queensland Regional Organisation of Councils
- Councillor Barry Hughes, Chair, North West Queensland Regional Organisation of Councils
- Councillor Samantha O'Toole, Chair, South West Queensland Regional Organisation of Councils
- Ms Simone Talbot, Executive Officer, South West Queensland Regional Organisation of Councils

## **Friday 8 November 2024**

### **Canberra**

#### **Kiama Municipal Council**

- Ms Jane Stroud, Chief Executive Officer
- Ms Olena Tulubinska, Chief Financial and Technology Officer

#### **Tweed Shire Council**

- Mr Michael Chorlton, Director, Corporate Services
- Mr Troy Green, General Manager

#### **Canberra Region Joint Organisation**

- Councillor Russell Fitzpatrick, Chairperson
- Ms Sharon Houlihan, Executive Officer

#### **Cootamundra-Gundagai Regional Council**

- Mr David Graham, Councillor
- Mr Steve McGrath, Interim General Manager

#### **Broken Hill City Council**

- Mayor Tom Kennedy

#### **Hay Shire Council**

- Ms Kirstyn Thronder, Executive Manager, People and Governance

#### **Country Mayors Association of New South Wales**

- Mr Russell Fitzpatrick, Member

### **Central New South Wales Joint Organisation**

- Ms Jennifer Bennett, Executive Officer
- Mr Kent Boyd, General Manager, Parkes Shire Council; and Member, General Managers Advisory Committee; and General Manager, Hornsby Shire Council

### **Southern Sydney Regional Organisation of Councils**

- Mr Richard Sheridan, Member, Finance Group; and Director, City Performance, Bayside Council
- Mr Craig Swift-McNair, Chair; and General Manager, Woollahra Council

### **Northern Sydney Regional Organisation of Councils**

- Mr Steven Head, Chair, General Managers Advisory Committee
- Dr Meg Montgomery, Executive Director

### **Northern Beaches Council**

- Ms Caroline Foley, Chief Financial Officer

### **Australian Services Union**

- Mr John Chisholm, Workplace Delegate, South Australian and Northern Territory Branch
- Ms Karen Colli, Branch Executive Councillor, Local Government Division, Western Australian Branch
- Ms Kristen Gilbertson, President, South Australian and Northern Territory Branch
- Ms Tanya Goddard, Workplace Delegate, Victorian and Tasmanian Authorities and Services Branch
- Mrs Jill Hugo, Assistant Branch Secretary, Western Australian Branch
- Mr Savvas (Sam) Ktisti, Workplace Delegate, South Australian and Northern Territory Branch
- Ms Margaret L'Estrange, Vice-President, South Australian and Northern Territory Branch
- Ms Chloe Schlemitz, Workplace Delegate, Victorian and Tasmanian Authorities and Services Branch
- Ms Abbie Spencer, Secretary, South Australian and Northern Territory Branch
- Ms Tash Wark, Branch Secretary, Victorian and Tasmanian Authorities and Services Branch
- Mr Tom Wenbourne, Branch Executive Member, Local Government, Western Australian Branch

# Attachment 2

# **ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA**

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment. The onus remains on any person using material in the judgment to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court in which it was generated.

## **BRIXTON v CITY OF HOLDFAST BAY**

**[2025] SAERDC 4**

**Judgment of Commissioner Ryan and Commissioner Kirkham**

**28 February 2025**

**ENVIRONMENT AND PLANNING - PLANNING - DEVELOPMENT  
ASSESSMENT AND CONTROL - NOTICES AND ORDERS – ENFORCEMENT**

**ENVIRONMENT AND PLANNING - BUILDING CONTROL - OPERATION OF  
STATUTORY CONTROLS – ENFORCEMENT**

**ENVIRONMENT AND PLANNING - COURTS AND TRIBUNALS WITH  
ENVIRONMENT JURISDICTION - SOUTH AUSTRALIA - ENVIRONMENT,  
RESOURCES AND DEVELOPMENT COURT AND ITS PREDECESSORS -  
POWERS ON APPEAL AND REVIEW**

Appeal against an enforcement notice issued by the Council pursuant to s 213 of the Planning, Development and Infrastructure Act 2016 (SA) alleging a breach of s 156 of the Act – the Council alleges that the owner has not ensured that the required designated safety features have been installed and maintained in accordance with prescribed requirements in relation to a swimming pool and spa located on her property – the owner has relied upon a development approval that was issued by the Council following the grant of a building consent by a private certifier - whether the Council can allege that the safety features installed on the land in accordance with that approval are contrary to s 156 of the Act – alleged there can be no breach in those circumstances – alleged the notice is defective as the breach is not sufficiently particularised - whether the obligations of an owner under s 156 of the Act are subject to or avoided by a development authorisation granted under the Act – collateral challenge to the building consent which the Council asserts is a nullity given it is so illogical or irrational that no reasonable decision maker could have approved it – whether the Court has jurisdiction to consider a collateral challenge in these proceedings – approach to the interpretation and application of the relevant provisions of the National Construction Code 2019 Building Code of Australia, Volume 2 (BCA) and the relevant Australian Standards with respect to swimming pool safety considered.

---

**Appellant: SHIRLEY BRIXTON      Counsel: MR E GUTHRIE - Solicitor: JOHNSTON WITHERS**  
**Respondent: CITY OF HOLDFAST BAY      Counsel: MS M CONDUIT - Solicitor: KELLEDY JONES**  
**Hearing Date/s: 19/08/2024, 20/08/2024**  
**File No/s: ERD-24-000030**

**B**



Held:

1.The appeal is dismissed.

2.Having regard to the text, context and statutory purpose of the provisions of the BCA it is intended that a barrier must be in place between a swimming pool and any Class 1 building located on the land, which would include a Class 1a building (containing habitable rooms) that is located within the pool surrounds of a swimming pool.

3.The inclusion of the words “immediate pool surrounds” in performance requirement P2.7.1(c) of the BCA is a limiting term which seeks to reduce in size the area of land surrounding a swimming pool that is required to be enclosed by a barrier thereby reducing in size the area of land within which a young child is required to be under supervision or surveillance. The immediate pool surrounds would include the area of land surrounding the pool which is directly related to the swimming pool itself and would not include a Class 1a building located within the pool surrounds of a swimming pool.

4.The existing barrier on the land does not comply with the provisions of the BCA (P2.7.1(a) or P2.7.1(c)) or Australian Standard AS 1926.2-2007 because there is no barrier in place between the pool house, a Class 1a building, and the swimming pool and spa located on the property.

5.The owner is in breach of s 156 of the Act because the designated safety features for the swimming pool and spa, which in this case, are the requirements relating to the construction and safety of swimming pools under the relevant provisions of the BCA have not been complied with (reg 6(1)(b) Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2019 (SA)).

6.An owner’s obligation to comply with s 156 of the Act is not subject to or avoided by a development approval that has been granted to a development application. The swimming pool safety legislation operates outside the development approval process.

7.Upon receipt of the building consent issued by the private certifier, the Council was required to accept that the building consent complied with the Building Rules (s 118(8) Planning, Development and Infrastructure Act 2016 (SA)). Further, subject to satisfying itself that all necessary consents had been obtained, that none of the consents had lapsed and that the consents were consistent, the Council was obliged to grant the necessary development approval to the application given the scheme of the Act (reg 53 (5) Planning, Development and Infrastructure (General) Regulations 2017 (SA)).

8.The enforcement notice issued by the Council was reasonably clear and unambiguous in its terms. The recipient of the notice would have understood the nature of the breach alleged and what she was required to do to rectify the breach. The notice is valid.

*Planning, Development and Infrastructure Act 2016 (SA); Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2019 (SA); Planning, Development and Infrastructure (General) Regulations 2017 (SA); Planning, Development and Infrastructure (Accredited Professionals) Regulations 2019; Legislation Interpretation Act 2021 (SA); Environment Resources and Development Court Act 1993 (SA); National Construction Code 2019, Building Code of Australia, Volume Two, Amendment 1; Australian Standard – Swimming pool safety – Part 1: Safety barriers for swimming pools (AS 1926.1-2012); Australian Standard – Swimming pool safety – Part 2: Location of safety barriers for swimming pools (AS 1926.1-2007), referred to. Amberich Pty Ltd v The City of Mount Gambier [2013] SAERDC 12; Sullivan v District Council of Riverton (1997) 69 SASR 234; City Apartments Pty Ltd v Hall & Others [2001] SASC 337; Garden College v City of Salisbury [2022] SAERDC 10; Jacobs v Onesteel Manufacturing Pty Ltd v Workcover Corporation of SA [2006] 93 SASR 568; Cairo v The Corporation of the City of Norwood Payneham & St Peters & Anor [2018] SAERDC 11; Project Blue Sky Inc and Others v Australian Broadcasting Authority (1998) 194 CLR 355; Charara v Ku-ring-gai Council [2019] NSWLEC 183; Capital Recycling Solutions Pty Ltd v Planning and Land Authority of the Australian Capital Territory [2019] ACTSC 58; Minister for Immigration and Citizenship v SZMDS & Anor (2010) 240 CLR 611; Ousley v The Queen (1997) 192 CLR 69; Liu & Anor v City of Playford [2014] SAERDC 31; Attorney-General (Cth) v Breckler (1999) 197 CLR 83; Minister for Immigration & Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; Jadwan Pty Ltd v Secretary, Department of Health & Aged Care [2003] FCACF 288; Martinovic v Workers Compensation Commission of New South Wales*

[2019] NSWSC 1532; *Jackson v Purton* [2011] TASSC 28; *Thorpe v City of Unley* [2006] SAERDC 81, considered.

**BRIXTON v CITY OF HOLDFAST BAY**  
**[2025] SAERDC 4**

**THE COURT DELIVERED THE FOLLOWING JUDGMENT:**

**Introduction**

1 This is a decision of the Court in relation to an appeal commenced by Ms Shirley Brixton (*Ms Brixton* or the *appellant*) against an enforcement notice dated 17 April 2024 (the *Notice*) issued to her by the City of Holdfast Bay (the *Council* or the *respondent*) pursuant to section 213 of the *Planning Development & Infrastructure Act 2016 (SA) (Act)*.

2 The Notice alleges that Ms Brixton has breached the Act by failing to comply with s 156 of the Act with respect to an outdoor swimming pool and spa located on her property. It is alleged that she has not ensured that the required designated safety features have been installed and maintained in accordance with prescribed requirements.<sup>1</sup>

3 The appellant challenged the validity of the Notice on a number of grounds, two of which were abandoned prior to the commencement of the hearing.<sup>2</sup> Three grounds remain extant. First, the appellant denies that she has breached the Act. She contends that the required designated safety features have been installed and are being maintained in accordance with the prescribed requirements. Secondly, she submits that she was granted development approval by the Council on 3 March 2023, and that she has complied with that approval. She argues that her compliance with that development approval does not permit the Council to allege that she has breached s 156 of the Act. Thirdly, she alleges that the Notice is defective as the respondent has not adequately specified or particularised within the Notice how she has failed to comply with the relevant *Australian Standards*<sup>3</sup> or the provisions of the National Construction Code (the *NCC*).

4 The Council asserts that Ms Brixton is and remains in breach of the Act, that the Notice is clear and unambiguous and that the appeal should be dismissed. The Council claims that the appellant's failure to erect a swimming pool safety barrier between a pool house (a Class 1a building), and an outdoor swimming pool and spa located on her property, is contrary to the relevant provisions of the NCC. As a result, it is alleged that she has breached s 156 of the Act, regardless of the terms of any development approval granted by the Council. The Council submits that the obligations of an owner under s 156 of the Act are not subject to or avoided by a development authorisation that has been granted under the Act.

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<sup>1</sup> *Planning, Development and Infrastructure Act 2016 (SA)*, s 156(3)(a).

<sup>2</sup> The appellant only pressed grounds 1, 2 and 4 at the hearing. She no longer pressed grounds 3 or 5.

<sup>3</sup> *Australian Standard – Swimming pool safety – Part 1: Safety barriers for swimming pools* (AS 1926.1-2012) and *Australian Standard – Swimming pool safety – Part 2: Location of safety barriers for swimming pools* (AS 1926.1-2007).



5 In the alternative, the Council asserts by way of a collateral challenge that the building consent which was granted by a private certifier, which, on the Council's case, resulted in non-compliance with the NCC was so illogical or irrational that no reasonable decision maker could have approved it.<sup>4</sup> The certifier's decision, as argued by the Council, was therefore the subject of jurisdictional error and was a nullity.<sup>5</sup>

6 The Court makes the following findings. Ms Brixton has breached s156 of the Act. The required designated safety features with respect to the outdoor swimming pool and spa located on her property have not been installed and maintained in accordance with the prescribed requirements. The obligations of an owner under s 156 of the Act are not subject to or avoided by a development authorisation that has been granted under the Act. The Notice was lawfully issued by the respondent and is clear and unambiguous in its terms. Given the decision of the Court in relation to the Notice, it is not necessary to determine the Council's collateral challenge regarding the certifier's decision. In any event, because the private certifier was not a party to the proceedings and was not given an opportunity to make submissions to the Court and to respond to the collateral challenge, we do not consider that it would be appropriate for the Court to rule on that issue in the circumstances of this particular case.<sup>6</sup>

## **Background**

### ***The Land***

7 Ms Brixton is the registered proprietor of the land located at 30 Partridge Street, Glenelg being the land comprised within Certificate of Title Register Book Volume 5667 Folio 694 (the *Land*). She became the owner of the Land in 2016. The Land has a frontage to Partridge Street and otherwise shares its boundaries with other adjoining residential properties.

8 Located on the Land is a two storey detached dwelling (the *Dwelling*), an outdoor swimming pool (the *Pool*), a spa (the *Spa*) and a pool house (the *Pool House*). The Pool, the Spa and the Pool House are sited behind the Dwelling towards the rear of the Land (the *Pool Area*). A glass pool fence containing a child resistant gate (the *Gate*) separates the Pool Area from the Dwelling. Critically, on the appellant's case, there is no other way in which the Pool Area can be accessed, other than through the Gate.

9 Once inside the Pool Area, access from the Pool House to the Pool and the Spa is open and unimpeded, that is, there is no barrier in place separating the Pool House from the Pool and the Spa. The central issue in these proceedings is whether

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<sup>4</sup> *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611.

<sup>5</sup> *Cairo v The Corporation of the City of Norwood Payneham & St Peters & Anor* [2018] SAERDC 11.

<sup>6</sup> *Jacobs v OneSteel Manufacturing Pty Ltd* [2006] 93 SASR 568, [93]-[94].

it is a requirement of the NCC that a safety barrier is required to be in place preventing access from the Pool House to the Pool and the Spa.

10 The appellant submits that the safety barrier that is located on the Land, which currently separates the Pool Area from the Dwelling, satisfies the requirements of the relevant *Australian Standards*.<sup>7</sup> She submits that there is no way to access the Pool and the Spa other than through the safety barrier that currently exists on the Land. She asserts that this existing barrier is compliant with and satisfies the requirements of the *Australian Standards*.<sup>8</sup>

### ***History of development approvals***

11 It is necessary to set out the details of two development approvals that have been granted in relation to the Land in 2014 and more recently in 2023.

#### *2014 Approval*

12 On 3 July 2014, development application number 110/00480/14 was submitted to the Council, being an application for a development described as the “*construction of a two storey detached dwelling with integrated garage with a wall height of 3 metres and wall length of 6.5 metres sited on the southern side boundary, swimming pool and spa<sup>9</sup> in yard and re-roof existing outbuilding*” on the Land (the *2014 Development*). On 10 September 2014, a Development Plan consent was granted to the 2014 Development subject to ten conditions. On 23 October 2014, a Building Rules consent was granted to the 2014 Development subject to four conditions.<sup>10</sup> The Building Rules consent was granted by a private certifier Professional Building Services Australia Pty Ltd (*PBS*) and not the Council. Following the grant of all necessary consents, a development approval was then issued by the Council on 30 October 2014.<sup>11</sup> The 2014 Development was assessed and determined under the *Development Act 1993* (SA) (now repealed).

13 The site plan which was granted Building Rules consent and development approval shows the approved swimming pool (the Pool) located towards the rear of the Land.<sup>12</sup> The site plan also depicts a 1.2m high glass pool fence and gate which restricts access to the Pool from the approved dwelling (the Dwelling).<sup>13</sup> The Pool House is also shown on this site plan (referred to as an existing outbuilding *to be refurbished* on the development application form).<sup>14</sup> The dimensions of the Pool House, as approved, indicate that it has a floor area of some 125 m<sup>2</sup> approximately<sup>15</sup> which equates to one third of the total floor area of the

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<sup>7</sup> Appellant, Written submissions of appellant, dated 16 August 2024, [6].

<sup>8</sup> Ibid, [8].

<sup>9</sup> The spa was proposed to be located within the pool itself and was not a separate structure which was described as “*sitting edge with spa jets*”, see Exhibit R1 at [133].

<sup>10</sup> Exhibit R1, at [119]-[122].

<sup>11</sup> Ibid, at [114]-118].

<sup>12</sup> Ibid, at [127].

<sup>13</sup> Exhibit R1 at [127], [133] and [314].

<sup>14</sup> Exhibit R1 at [314].

<sup>15</sup> Ibid at [134], i.e., 12.19m x 10.21m = 124.4599.

Dwelling (upper and lower floor levels combined).<sup>16</sup> The approved plans depict both the existing and proposed southern elevation of the Pool House.<sup>17</sup> As approved, the proposed southern elevation of the Pool House included a “*new aluminium sliding stacker door*” together with a set of 2400mm high fixed windows and further to the east, a sash window with a restricted opening. On this approved plan, there is no access provided to the Pool from the Pool House because the aluminium sliding stacker door of the Pool House is located *outside* the approved 1.2m high glass pool fence.<sup>18</sup> The approved 1.2m high glass pool fencing is described as including a “*dog-leg design*” which specifically excludes the aluminium sliding stacker door of the Pool House.<sup>19</sup>

- 14 As approved in the 2014 Development, the only way in which the Pool could be accessed was through a child resistant gate which was located within the safety barrier.<sup>20</sup> There is no dispute that the safety barrier approved through the 2014 Development complied with the prescribed requirements in force at that time.<sup>21</sup> As of 29 June 2016, the Dwelling, the Pool House, the Pool and a compliant pool safety barrier had all been constructed on the Land, in accordance with the approved 2014 Development.<sup>22</sup>

### *2023 Approval*

- 15 On 3 March 2023, development application number 23004601 was granted a development approval by the Council pursuant to the provisions of the Act. The nature of the development on the decision notification form was described as a *swimming pool* on the Land.<sup>23</sup> The 2023 Development is more accurately described as an *inground concrete spa and safety fence* (the *2023 Development*). The development approval granted to the 2023 Development comprised a planning consent granted by the respondent’s Assessment Manager on 24 February 2023, subject to two conditions and a building consent, once again granted by PBS, on 27 February 2023, subject to seven conditions. The 2023 Development included the construction of an in ground concrete spa located beside the Pool within the Pool Area (the Spa) and the removal of a portion of the previously approved swimming pool safety barrier, resulting in a reconfigured safety barrier.

- 16 The approved site plan shows the section of the safety barrier that was to be removed, namely the *dog leg* section referred to earlier, and the location of the

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<sup>16</sup> Ibid at [127], see site coverage calculations which provide that the ground floor (inc. porch) has a floor area of 245m<sup>2</sup> and the first floor has a floor area of 145m<sup>2</sup>.

<sup>17</sup> Ibid, at [133].

<sup>18</sup> Ibid.

<sup>19</sup> Exhibit R7, [13.1].

<sup>20</sup> Respondent, Outline of submissions, dated 16 August 2024, [4]; Appellant, Written submissions of appellant, dated 16 August 2024, [13].

<sup>21</sup> Exhibit R7, [8].

<sup>22</sup> FDN12, [2] and [5].

<sup>23</sup> Exhibit R1 at [329]-[333]. Under the Act, a “*swimming pool*” includes a “*spa pool*”, *Planning, Development and Infrastructure Act 2016* (SA), s 3.

newly reconfigured pool safety barrier.<sup>24</sup> A copy of the approved site plan which depicts the location of the barrier as approved in 2014 (shown with a dashed light blue line) and the reconfigured barrier approved in 2023 (shown with a solid darker blue line incorporating a child resistant safety gate shown in red), is attached to this decision.

17 The approved site plan also identifies the location of the “sliding door” of the Pool House which was previously located *outside* the 2014 barrier. There is a note on the approved site plan, beside the sliding door of the Pool House, which provides that it would be “*the only opening and access in the entertainment room*”:

18 As approved in 2023, the only way in which access could be obtained to the Pool Area from the Dwelling (a Class 1 building) was, once again, through a child resistant safety gate, located within the reconfigured pool safety fence. As approved in 2023, it was now possible to access the Pool and the Spa directly from the Pool House, because the aluminium sliding stacker doors of the Pool House were now located inside the reconfigured 1.2m high glass pool fence.

### ***2023 inspection***

19 On 17 May 2023, the Council was notified that construction of the 2023 Development had commenced on the Land.<sup>25</sup> On 19 October 2023, a Council building officer, Mr Richard Neaylon (*Mr Neaylon*) inspected the Land. Mr Neaylon observed that as a result of the reconfigured pool safety barrier there was now *direct access* to the Pool and Spa through the glass sliding doors of the Pool House. Mr Neaylon formed the view that the relocation of the approved 2014 safety barrier constituted a breach of section 156(4) of the Act.<sup>26</sup>

20 Following his inspection, Mr Neaylon emailed Mr Grant Riches of PBS and advised him of his concerns with respect to the removal and relocation of the approved 2014 safety barrier.<sup>27</sup> Mr Riches sent an email in response advising that PBS had approved the alteration to the safety barrier as a ‘minor’ variation pursuant to regulation 65 of the *Planning, Development and Infrastructure (General) Regulations 2017 (SA)* (the *General Regulations*) and that the reconfigured barrier complied with the *Australian Standards*.<sup>28</sup> According to the decision notification form, the building consent granted by PBS was not assessed as a *minor variation* pursuant to r 65 of the General Regulations. The 2023 Development was submitted as a fresh development application. It does not appear to have been described or assessed as a variation application (minor or otherwise) by PBS. Nothing turns on whether the application was a fresh application or a variation application in any event.

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<sup>24</sup> Ibid at [334].

<sup>25</sup> Exhibit R7, [12].

<sup>26</sup> Exhibit R7, [13.3].

<sup>27</sup> Ibid, [14].

<sup>28</sup> Ibid.

21 The Council alleges that the building consent granted by PBS on 27 February 2023 does not comply with the NCC. It contends that the decision to grant building consent to the 2023 Development was so illogical or irrational that no relevant authority, acting reasonably, could have approved it.<sup>29</sup> Notwithstanding, the Council granted a development approval to the 2023 Development upon receipt of the privately certified building consent. That decision by the Council to grant development approval to the 2023 Development related to one of the appellant's grounds as to why the Notice should be quashed and why the appeal ought to be allowed (ground 4).

22 The appellant asserts that she has complied with the terms of the 2023 Development which was granted a development approval by the Council. That approval permits direct access to the Pool and the Spa from the Pool House. She claims that it cannot be the case that she has breached or is currently in breach of her legal obligations under s 156 of the Act.

### **The view**

23 At the commencement of the hearing, a view of the Land was undertaken. What was observed and said at the view is not evidence. The view enabled the Court to understand the general layout of the Pool Area, the location of the Pool, the Spa and the Pool House on site, together with the features of the existing safety barrier in place on the Land which currently separates the Dwelling from the Pool Area, as approved through the 2023 Development. The Court also observed the Pool and the Spa and the area surrounding the pool generally from within the Pool House itself. Mr Neaylon later gave evidence about his observations.

### **The hearing**

24 The appellant did not call any witnesses nor did she give evidence herself. The respondent called one witness, Mr Neaylon. His evidence was given by affidavit, supplemented by oral evidence. He was cross-examined by counsel for the appellant. He gave evidence about the background to the matter, leading up to the issue of the Notice, the circumstances surrounding the development approval granted by the Council to the 2023 Development, and how he considered the provisions of the NCC and the *Australian Standards* should be interpreted. We accept Mr Neaylon as an honest and credible witness.

### **The Legislative Scheme**

#### ***The Act and associated regulations***

25 Section 156 of the Act sets out the legislative framework with respect to swimming pool safety in South Australia. The section must be read in conjunction with the *Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2019* (the *SPS Regulations*). Section 156 of the Act sets out the

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<sup>29</sup> *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611.

designated safety requirements for swimming pools. A failure to comply with these requirements constitutes a breach of the Act.<sup>30</sup> Section 156 provides:

- (1) In this section—  
**designated owner** means—
  - (a) in relation to a swimming pool—
    - (i) if the swimming pool is a fixture to, or forms part of, land—the owner of the land;
    - (ii) in any other case—the owner of the structure that constitutes the swimming pool; and
  - (b) in relation to a building—the owner of the building;

...
- (2) Without limiting any provision of the Building Code or a Ministerial building standard, the regulations may specify requirements that are to apply in relation to designated safety features for swimming pools or buildings.
- (3) In particular, the regulations may—
  - (a) require a designated owner of a swimming pool or building to ensure that designated safety features are installed and maintained in accordance with prescribed requirements; and
  - (b) require the owner of an existing swimming pool or building—
    - (i) to ensure that designated safety features are installed, replaced or upgraded before, or on the occurrence of, a prescribed event; or
    - (ii) to install, replace or upgrade designated safety features within a prescribed period.
- (4) A person who contravenes, or fails to comply with, a requirement under this section (including a requirement prescribed by the regulations) is guilty of an offence.  
Maximum penalty: \$15 000.

...

26 The following terms defined in s 3 of the Act assist in the interpretation and application of s 156 of the Act:

**designated safety features** means—

- (a) in relation to a swimming pool—swimming pool safety features; and
- (b) in relation to a building—safety features relating to the use or occupation of a building;

...

**swimming pool** means an excavation or structure that is capable of being filled with water and is used primarily for swimming, wading, paddling or the like and includes a bathing or wading pool or spa pool (but not a spa bath);

**swimming pool safety features** means a fence, barrier or other structure or equipment prescribed by the regulations for the purposes of this definition;

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<sup>30</sup> *Planning, Development and Infrastructure Act 2016 (SA)*, s 156(4).

...

27 The SPS Regulations set out the prescribed designated safety features for swimming pools pursuant to s 156(2) of the Act. Such features depend upon a number of different factors identified in r 6(1). Regulation 6 of the SPS Regulations provides:

- (1) For the purposes of section 156(2) of the Act, the following requirements are prescribed:
  - (a) in relation to a swimming pool approved, constructed or installed before 1 July 1993—the requirements set out in a Ministerial building standard published for the purposes of this regulation;
  - (b) in relation to any other swimming pool—the requirements relating to the construction and safety of swimming pools under the Building Code, as it applied at the time the application for a relevant consent or approval was made (being an application that related to the construction of the swimming pool or to some other form of building work where designated safety features are relevant).
- (1a) For the purposes of section 156(3)(a) of the Act—
  - (a) the requirements under subregulation (1) are prescribed; and
  - (b) the designated owner of a swimming pool must ensure that designated safety features are installed and maintained in accordance with the relevant requirements under subregulation (1).
- (2) For the purposes of section 156(3)(b)(i) of the Act, the designated owner of an existing swimming pool must ensure that designated safety features are installed in accordance with the relevant requirements under subregulation (1) before the occurrence of a prescribed event.  
(Our underlining).

28 Regulation 4 of the SPS Regulations further defines swimming pool safety features as follows:

- (1) For the purposes of the definition of *swimming pool safety features* in section 3(1) of the Act, the following features are prescribed (insofar as they are relevant to the particular circumstances taking into account the provisions of the Building Code):
  - (a) fences;
  - (b) barriers;
  - (c) water recirculation systems;
  - (d) secondary outlets from a swimming pool;
  - (e) warning notices.

...

29 The Pool and the Spa were both approved, installed or constructed *after* 1 July 1993. The designated safety features required to be installed and maintained

in relation to the Pool and the Spa are those identified in r 6(1)(b) of the SPS Regulations, namely, the requirements relating to the construction and safety of swimming pools under the Building Code, as it applied at the time the applications for the relevant consents or approvals were made.<sup>31</sup>

### ***The National Construction Code (NCC)***

30 The NCC is published in three volumes. The Building Code of Australia (BCA or the *Building Code*) is Volume One and Two of the NCC. The Plumbing Code of Australia is Volume Three of the NCC.<sup>32</sup> The *Building Code* referred to in r 6(1)(b) of the SPS Regulations, may be taken to be a reference to the NCC.

### ***Building classifications***

31 The NCC is a performance based code which sets out the technical requirements for the construction of buildings in Australia. In doing so, it groups buildings according to the purpose for which they are designed, constructed or adapted to be used rather than the function or use they are put to,<sup>33</sup> assigning each type of building or structure with a building classification. Throughout the NCC, buildings are referred to by their building classification. The particular assignment of a building classification to a building or structure plays an integral role in the interpretation and the application of the provisions of the NCC.

32 Building classifications are labelled ‘Class 1’ through to ‘Class 10’. Within some classifications, there are sub classifications, usually identified by a letter after the classification number, for example Class 1a. A reference to a building class is understood to be a reference to all the sub-classifications of that class.<sup>34</sup> However, a reference to a sub-classification within the NCC is solely to that sub-classification.<sup>35</sup> Relevantly, in this case, a Class 1a building is a sub-classification of a Class 1 building.<sup>36</sup>

33 Class 1 and 10 buildings, being residential type buildings are covered in Volume 2 of the NCC, whereas Class 2 to Class 9 buildings, being generally of commercial type construction, are covered in Volume 1 of the NCC.<sup>37</sup>

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<sup>31</sup> *Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2017* (SA), r 6(1)(b).

<sup>32</sup> NCC 2019 Volume Two, Amendment 1, Introduction to the National Construction Code, Format of the NCC, at [8].

<sup>33</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, *Introduction to this Part*, at [28].

<sup>34</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (4), at [14].

<sup>35</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (6), at [15].

<sup>36</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (5)(a), at [14].

<sup>37</sup> NCC 2019 Volume Two, Amendment 1, Introduction to the National Construction Code, Components of the NCC, at [8].



34 Compliance with the NCC is achieved by adhering to both the *governing requirements* and meeting the *performance requirements* of the NCC.<sup>38</sup> In order to meet her legal obligations under s 156 of the Act, as previously identified, the designated safety features which the appellant is required to have installed and maintained in relation to the Pool and the Spa on the Land are those relating to the construction and safety of swimming pools *under the Building Code* as it applied at the time the application for the relevant consents or approvals were made.<sup>39</sup>

#### *Performance requirements*

35 Performance requirements for the construction of buildings outline the minimum necessary standards different buildings or building elements *must* attain and are the technical provisions that *must* be satisfied.<sup>40</sup> A building will comply with the provisions of the NCC if it satisfies the performance requirements. A performance requirement can be met using either a performance solution, a deemed-to-satisfy solution or a combination of both.<sup>41</sup> A solution that complies with the deemed-to-satisfy provisions is deemed to have met the performance requirements.<sup>42</sup> A performance solution as defined in the NCC (alternative solution) is a means of complying with the performance requirements other than by way of a deemed-to-satisfy solution.<sup>43</sup>

#### *Relevant provisions of the NCC*

36 The version of the NCC which applied in relation to the assessment and determination of the 2023 Development was the *NCC 2019 Building Code of Australia – Volume Two, Amendment 1* (referred to hereafter as the *Building Code*). The most relevant provisions of the Building Code were included in the respondent’s book of documents which were tendered.<sup>44</sup> The performance provisions of the Building Code contained in Section 2<sup>45</sup> contain the *performance requirements* for Class 1 and 10 buildings.

37 A Class 1a building is defined in the Building Code to include “*one or more buildings, which together form a single dwelling including...a detached house*”.<sup>46</sup> Figure 3 within the governing requirements of the Building Code attempts to

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<sup>38</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A2 Compliance with the NCC, A2.0 Compliance, at [16].

<sup>39</sup> *Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2019* (SA), r 6(1)(b).

<sup>40</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A2 Compliance with the NCC, A2.4, A combination of solutions (Explanatory Information) at [17].

<sup>41</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A2 Compliance with the NCC, A2.1 Compliance with the Performance Requirements, at [16].

<sup>42</sup> *Ibid.*

<sup>43</sup> NCC 2019 Volume Two, Amendment 1, Schedule 3 Definitions, *Performance Solution*, at [512].

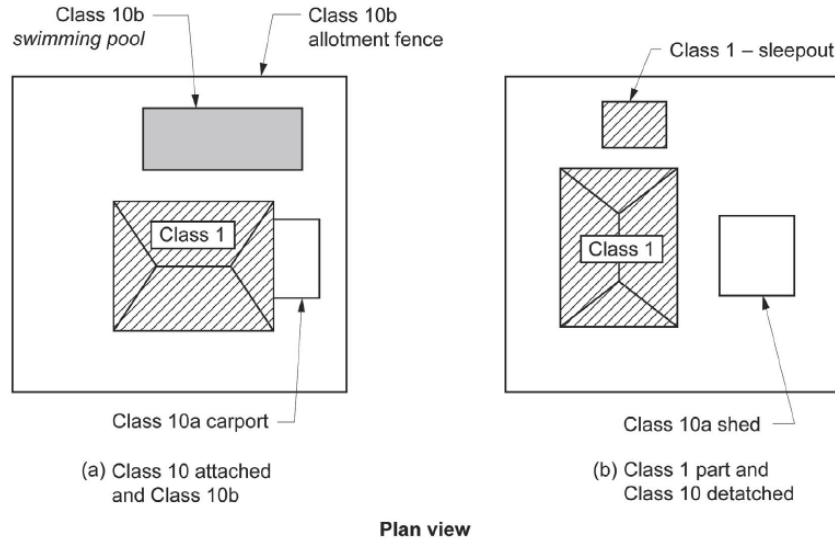
<sup>44</sup> Exhibit R1 at [8]-[11].

<sup>45</sup> NCC 2019 Volume Two, Amendment 1, Section 2 Performance Provisions, at [40] – [76].

<sup>46</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, A6.1 Class 1 buildings, at [28].

demonstrate the different ways in which Class 1 and 10 buildings may be classified on land that is used for residential purposes:

Figure 3: Domestic allotment – Classification of buildings and structures



38 As illustrated<sup>47</sup> a dwelling and a separate detached building on the same allotment in the nature of a sleepout, as shown in the example, are both considered to be a Class 1 building. Having regard to the definition of a Class 1a building in the Building Code, they are considered together to form a single dwelling. An attached carport or a detached shed are identified as Class 10a buildings. A swimming pool or a fence are identified as Class 10b buildings.

39 The relevant performance provisions relating to access to *swimming pools* are listed in Section 2, within Part 2.7, of the Building Code.<sup>48</sup> The following provisions are set out in advance of the listed (mandatory) performance requirements:

## Part 2.7

### Explanatory Information

#### Objective

#### O2.7

The Objective is to –

<sup>47</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, A6.1 Class 1 buildings, Figure 3, at [31].

<sup>48</sup> NCC 2019 Volume Two, Amendment 1, Section 2 Performance Provisions at [71] – [72]; Exhibit R1 at [8-9].

(a) safeguard young children from drowning or injury in a *swimming pool*<sup>49</sup>; and

...

### **Application**

O2.7(a) ... only apply to a *swimming pool* with a depth of water more than 300mm

...

### **Functional statements**

#### **F2.7.1 Swimming pool access**

A *swimming pool* is to be provided with –

(a) means to restrict access to it by young children;

...

40 The following *performance requirements* apply with respect to the objectives and functional statements listed above:

### **Performance Requirements**

#### **P2.7.1 Swimming pool access**

A barrier must be provided to a *swimming pool* and must –

(a) be continuous for the full extent of the hazard; and

(b) be of a strength and rigidity to withstand the foreseeable impact of people; and

(c) restrict access of young children to the pool and the immediate pool surrounds;  
and

(d) have any gates and doors fitted with latching devices not readily operated by young children, and constructed to automatically close and latch.

41 As stated previously, compliance with the Building Code is achieved through meeting the performance requirements of the NCC. The requirements which relate to the construction and safety of swimming pools under the Building Code referred to in r 6(1)(b) of the SPS Regulations include those which are set out in P2.7.1, listed above.

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<sup>49</sup> “*swimming pool*” is defined in Schedule 3 of Volume Two of the NCC to mean: *any excavation or structure containing water and principally used, or that is designed, manufactured or adapted to be principally used for swimming, wading, paddling, or the like, including a bathing or wading pool, or spa*, at [518].

42 Part 3.10.1.0 of the Building Code<sup>50</sup> lists the following *acceptable construction manuals*<sup>51</sup> with respect to the *performance requirements* in P2.7.1. Acceptable construction manuals are deemed-to-satisfy referenced documents. It provides:

**Acceptable Construction Manuals**

**3.10.1.0**

- (a) *Performance Requirement 2.7.1* is satisfied for a *swimming pool* with a depth of water more than 300mm and which is associated with a Class 1 building, if it has safety barriers installed in accordance with AS 1926.1 and AS 1926.2

...

(Our underlining)

43 There are some State and Territory listed variations under Part 3.10.1.0, which provide that in some cases there are further and/or different regulations which may apply. Presently there are none listed that apply in South Australia relevant to the determination of this matter.

44 Part 3.10.1.0 is a deemed-to-satisfy provision of the Building Code.<sup>52</sup> As we have previously identified, a solution that complies with a deemed-to-satisfy provision meets the relevant performance requirements of the Building Code which are those listed in P2.7.1. Provided a swimming pool *that is associated with a Class 1 building*<sup>53</sup> has a safety barrier which complies with AS1926.1 and AS 1926.2, it will be deemed to have met the *performance requirements* in P2.7.1 of the Building Code.

45 The appellant's case is that the barrier in place on the Land complies with AS1926.1 and AS 1926.2. She therefore contends that the performance requirements of the Building Code *are* met (through the deemed to satisfy solution in Part 3.10.1.0) and so there can be no breach of r 6(1)(b) of the SPS Regulations or s 156 of the Act.

***The Australian Standards***

46 AS 1926.1 and AS 1926.2 referred to in Part 3.10.1.0 (a) of the Building Code is a reference to the Australian Standards that apply in this case, namely;

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<sup>50</sup> NCC 2019 Volume Two, Amendment 1, Section 3 Acceptable Construction, at [334] – [335]; Exhibit R1 at [10-11].

<sup>51</sup> In Section 3 of Volume Two of the NCC the *deemed-to-satisfy provisions* are divided into two compliance pathways; "*acceptable construction practices*" and "*acceptable construction manuals*". "*Acceptable construction practices*" are some of the most common forms of national construction practice and are written into Section 3. "*Acceptable construction manuals*" are the deemed-to-satisfy referenced documents (NCC 2019 Volume Two, Amendment 1, Section 3 Acceptable Construction, *How to use Section 3*).

<sup>52</sup> Ibid.

<sup>53</sup> NCC 2019 Volume Two, Amendment 1, Section 3 Acceptable Construction, 3.10.1.0 (a) at [334]; Exhibit R1 at [10].

*Australian Standard – Swimming pool safety – Part 1: Safety barriers for swimming pools (AS 1926.1-2012) and Australian Standard – Swimming pool safety – Part 2: Location of safety barriers for swimming pools (AS 1926.1-2007).*

47 The relevant Australian Standards were included in the respondent's tendered book of documents.<sup>54</sup> AS 1926.1-2012, (being Part 1 of the Standards), sets out the design and construction elements, and the *technical requirements* of a barrier, amongst other matters. The preface to AS 1926.1-2012,<sup>55</sup> includes the following:

The objective of this Standard is to assist pool owners/users in avoiding pool-related drowning by providing design, construction and performance of various barrier options, which are designed to restrict entry to the swimming pool area by young children.

...

Statistical evidence shows that the majority of drowning deaths in private swimming pools involve children under five years of age. For this reason, the requirements established by this Standard are directed at achieving a barrier that will make it difficult for a young child to gain access to a pool area, whether under, over or through the barrier.

It should be noted that the provisions of this Standard related to barriers that are intended to be child resistant but not childproof, as effectiveness of the barrier is very much dependent on its location, installation and maintenance.

The requirements are established with the intention of leaving a high degree of flexibility to the consumer in the choice of a barrier, desirable aesthetics and cost.

...

(Our underlining).

48 Part 2 of the Australian Standards, AS 1926.2-2007, sets out the *locational requirements* for barriers. The preface to AS 1926.2-2007 includes the following:

The objective of this Standard is to assist pool users/owners in avoiding pool-related drowning by providing options for the location of pool barriers, which are designed to deny, delay or detect unsupervised entry to the swimming pool area by young children.<sup>56</sup>

(Our underlining).

49 AS 1926.2-2007 sets out the options for the location of safety barriers intended to restrict the access of young children to swimming pools.<sup>57</sup>

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<sup>54</sup> Exhibit R1 at [49]-[113].

<sup>55</sup> Ibid at [52].

<sup>56</sup> Exhibit R1 at [101].

<sup>57</sup> Ibid at [103], under heading *I. Scope*.

50 It was submitted that AS 1926.2-2007 is the most relevant of the two parts of the Standards which apply in this matter. The latest version of Part 2 of the Standards was published in 2007. It is the Standard which applied to both the 2014 Development and the 2023 Development.

51 It was not in dispute that the Pool and the Spa each fall within the definition of an *outdoor pool* as that term is defined<sup>58</sup> in the Standards. Clause 4 of AS 1926.2-2007<sup>59</sup> sets out the options for the location of barriers and provides typical examples of outdoor pool barrier locations. It provides, in part:

#### **4 OPTIONS FOR LOCATION OF BARRIERS**

##### **4.1 General**

All barriers shall comply with AS 1926.1.<sup>60</sup> The location of barriers shall comply with clauses 4.2, 4.3 or 4.4<sup>61</sup> as applicable.

##### **4.2 Outdoor pools**

A child resistant doorset shall not be installed in a barrier for an outdoor pool. The openable portion of any window in a barrier shall comply with AS 1926.1.

A balustrade on a balcony projecting into any NCZ shall comply with AS 1926.1.

Typical examples of barrier locations are given in Figure 2.1.

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<sup>58</sup> An *outdoor pool* is defined as “a pool that is neither fully nor partly enclosed by a building”, Exhibit R1 at [104].

<sup>59</sup> Exhibit R1 at [104-107].

<sup>60</sup> Noting again that AS 1926.1 is concerning with the design and construction and the technical requirements of a barrier.

<sup>61</sup> Clause 4.3 and 4.4 have no application in this matter.

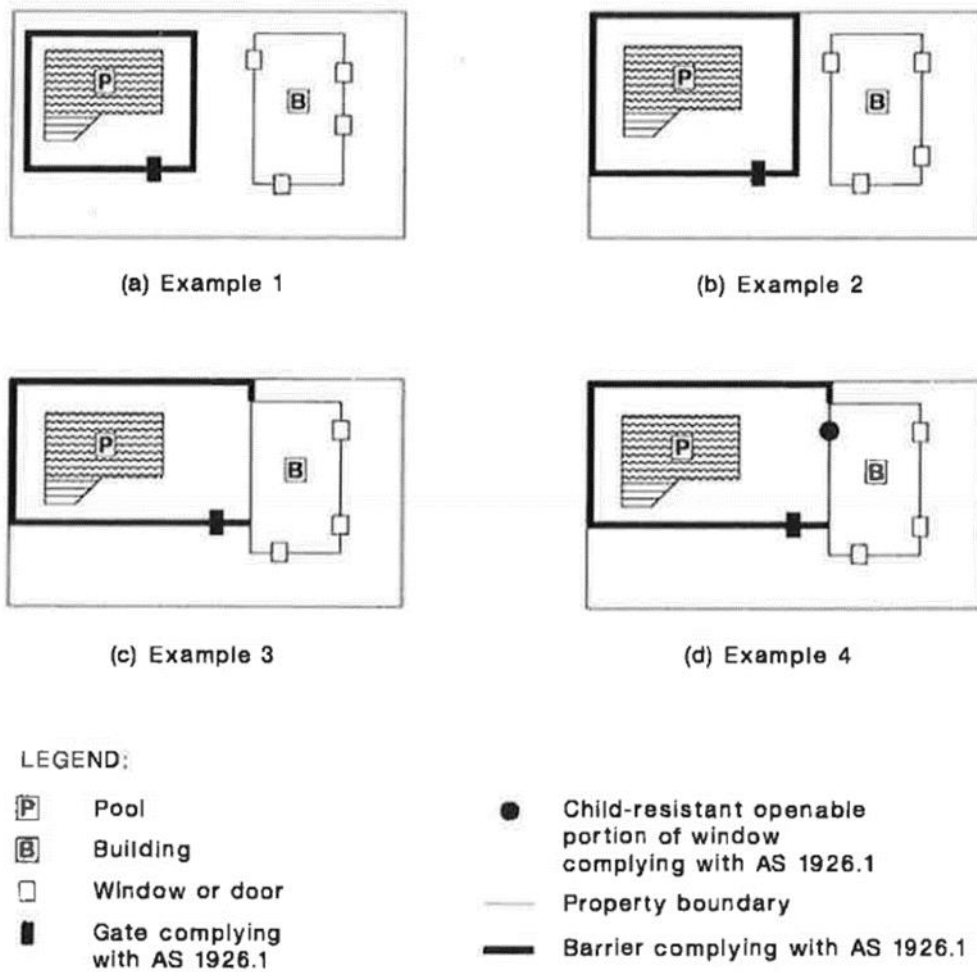


FIGURE 2.1 TYPICAL EXAMPLES OF OUTDOOR POOL BARRIER LOCATIONS

52 In these examples, “B” represents a “Building”. We note that there is nothing to suggest in the examples provided or the text of the provisions that “B” only represents a single detached dwelling on an allotment, and that “B” does not represent, for example, a separate detached building which forms part of the Class 1 building, such as a sleepout (or a similar Class 1a building). If “B” was only representative of a house, the diagrams and the legend used to explain the different elements within the diagrams could have been drafted to reflect that intended interpretation.

53 The following definitions are relevant to the interpretation of Part 2 of the Standards which are set out in AS 1926.2-2007:<sup>62</sup>

<sup>62</sup> Exhibit R1 at [103-104].

### 3.1 Barrier

The assembly of components, natural or otherwise, that restricts access to the pool, including items such as fences, posts and panels, gate units, gates and doorsets, constructed or natural walls (retaining or otherwise), sides of buildings, and balustrades on a balcony, where they form part of the intended barrier.

### 3.2 Child resistant doorset

A doorset that comprises a door, door frame, self-closing device and self-latching device, that is designed to provide an access way from the building to an indoor pool.

...

### 3.8 Indoor Pool

A pool that is fully enclosed within a residential building or a separate building.

...

### 3.10 Outdoor Pool

A pool that is neither fully nor partly enclosed by a building.

### 3.11 Indoor/outdoor pool

A pool that is partly enclosed by a building and partly an outdoor pool.

### 3.12

#### Pool area

The area that contains the pool and is enclosed by a safety barrier.

...

54 A “pool area” is a defined term in the Australian Standards. It is not a defined term or phrase in the Building Code, nor does it appear in the performance requirements of the Building Code with respect to swimming pool safety. P2.7.1(c) provides that a barrier must restrict access by young children to the pool *and* the immediate pool surrounds, it does not refer to “the pool area”.

55 In both Parts 1 and 2, the following explanatory information is provided to assist in the interpretation of the Standards:

The terms ‘normative’ and ‘informative’ have been used in this Standard to define the application of the appendix to which they apply. A ‘normative’ appendix is an integral part of the Standard, whereas [in] an ‘informative’ appendix is only for information and guidance.<sup>63</sup>

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<sup>63</sup> Ibid at [52] and [101].



56 Guidance on factors to be considered in the selection of the location of barriers is set out in Appendix B to Part 2 of the Standards (*Appendix B*).<sup>64</sup> Appendix B is an *informative* appendix and thus is for information and guidance purposes only. It provides:

The distance of the barrier from the pool should take into consideration a safety margin sufficient to discourage diving and jumping from the barrier into the pool. The barrier should be located to enable adult supervision from within the pool area. Whenever a young child is inside a pool area, constant supervision is essential.

Where possible, tool sheds, garages, barbecues and clotheslines should be located outside the pool area to reduce the likelihood of self-closing gates being propped open in order to gain access.

...

The type of barrier and location of the pool within the property should permit viewing through or over the barrier so that the pool area may be directly viewed from commonly used areas of the building or yard.

...

## The Pool House

### *Building classification*

57 Under the Building Code, and as illustrated in the extract from the Building Code in Figure 3 within the governing requirements shown above, a single Class 1 dwelling may comprise *more than one* building. For example, it may include a detached house, plus one or more habitable outbuildings, such as a sleepout, as shown in the example provided in Figure 3.<sup>65</sup>

58 A *habitable building* cannot be classified as a Class 10 building.<sup>66</sup> A Class 10 building is a *non-habitable* building.<sup>67</sup> Some examples of a non-habitable building are; a garage, carport or shed. Class 10b buildings are non-habitable structures.<sup>68</sup> Some examples of these are swimming pools and fences.

59 The Building Code does not define what a *habitable building* is. It does however define a *habitable room* as follows:

a room used for normal domestic activities, and –

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<sup>64</sup> Exhibit R1 at [108].

<sup>65</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Explanatory Information, at [33].

<sup>66</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Explanatory Information, at [33].

<sup>67</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Part 6.10 Class 10 buildings and structures, (1) at [32].

<sup>68</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Part 6.10 Class 10 buildings and structures, (2) at [32].

- (a) includes a bedroom, living room, lounge room, music room, television room, kitchen, dining room, sewing room, study, playroom, family room, home theatre and sunroom; but
- (b) excludes a bathroom, laundry, water closet, pantry, walk-in wardrobe, corridor, hallway, lobby, photographic darkroom, clothes-drying room, *and other spaces of a specialised nature occupied neither frequently nor for extended periods.*<sup>69</sup>

(Our emphasis).

60 A habitable outbuilding which is appurtenant to another building is generally part of that building.<sup>70</sup> The explanatory information within the governing requirements of the Building Code provides:

Typical outbuilding classifications include the following:

- (1) A sleepout on the same allotment as a Class 1 building is part of the Class 1 building.
- (2) A detached entertainment room on the same allotment as a Class 1 building, perhaps associated with a swimming pool, is part of the Class 1 building.
- (3) A small toolshed, used for trade-related hobbies for non-commercial purposes or home repairs, on the same allotment as a Class 1 building, would be classified as a Class 10 building.<sup>71</sup>

(Our underlining).

61 It was not in dispute that the Pool House is a Class 1a, habitable outbuilding, under the Building Code.<sup>72</sup> Whilst a sleepout is not defined in the Building Code, the Macquarie dictionary defines a “sleep-out” as “*a separate outbuilding used as sleeping quarters*”.<sup>73</sup> The Pool House could be used as a sleepout. It has been designed and constructed in a way such that it could be adapted for such a use<sup>74</sup> even if it is not presently being used as such. Given the enclosed and weather proofed nature and layout of the Pool House, there is no reason why it could not be used as a sleepout.

62 Regardless of whether or not it could be considered to be a sleepout, the Pool House is a detached building which, while separate from the Dwelling on the Land, is a building containing *habitable rooms* which can be *used* for entertainment purposes, for example a lounge room, television room or home theatre room, etc. A detached *entertainment room* on the same allotment as a Class 1 building is part of the Class 1 building. A detached outbuilding containing more than one such

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<sup>69</sup> NCC 2019 Volume Two, Amendment 1, Schedule 3, Definitions at [509].

<sup>70</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Explanatory Information, at [37].

<sup>71</sup> Ibid.

<sup>72</sup> T56 lines 36-38, T57 line 1.

<sup>73</sup> *Macquarie Dictionary* (online at 29 January 2025) ‘sleep-out’, def. 2

<sup>74</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, *Introduction to this Part*, at [28].

room must also fall within the same building classification. We have determined that the Pool House can be described as a typical outbuilding which may be considered to be a part of the Class 1 building on the Land, the Dwelling. As previously identified, a Class 1a building is one or more buildings, which together form a single dwelling.<sup>75</sup> The Court finds that the Pool House is a Class 1a building.

63 The reference to a Class 1 building in Part 3.10.1.0 (a) of the Building Code includes all sub classifications for that building classification,<sup>76</sup> including a *Class 1a* building, which in this case, *includes the Pool House*.

***Observations on the view and Mr Neaylon's evidence***

64 On the view, the Court accessed the Pool Area through the Gate and then entered the Pool House. The Pool House contained four (4) separate rooms, two of which were much larger than the others. The smaller two rooms (which were connected to only one of the two main larger rooms) were (1) a bathroom, containing a shower, vanity and toilet, and a (2) a pool equipment room, both rooms being non-habitable rooms, as defined. The south facing elevation of the larger two main rooms contained mostly floor to ceiling glass facing out to the Pool Area. These two main rooms were separated internally by a dividing wall. They were each an *habitable room* as defined in the Building Code. They could each be *used* as a living room, dining room, bedroom, study, television room, home theatre room, etc.

65 The Court entered the Pool House through the set of glass sliding doors which led to the first of the two main habitable rooms. When positioned in this first habitable room it was not possible to see the whole of the Pool or the whole of the Pool Area because the dividing wall obstructed that view. Mr Neaylon gave evidence that when standing in the northwestern corner of this first main room, approximately 15% of the Pool could not be seen. A greater percentage of the Pool Area was also not visible from this location.<sup>77</sup> Moving eastwards within the same room and when positioned closer to the dividing wall which separates the two main rooms, from this location Mr Neaylon said that approximately 30% of the Pool could not be seen and less of the surrounding pool area.<sup>78</sup> We agree with those approximations. Depending on where a person is located in the first main habitable room of the Pool House, between 15% to 30% of the Pool could not be observed.

66 In the second of the two main habitable rooms, it was also not possible to see the entire Pool and the surrounding pool area. Again, the visibility of the Pool in this room was dependent on where a person was located when looking out to the

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<sup>75</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Part 6.1 Class 1 buildings, (1) at [28].

<sup>76</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (4)

<sup>77</sup> T12 lines 35-38 and T13 lines 1-3.

<sup>78</sup> T13 lines 13-22.

Pool. Visibility of the Pool was further reduced in part in this room due to the presence of a floor to ceiling nib wall which measured 1.5m (wide) x 2.7m (high) located between the fixed south facing glass window panels and the adjacent dividing wall. Mr Neaylon said that when standing in the centre of this second main room, approximately 15% of the Pool could not be seen and elsewhere approximately 30% of the Pool could not be seen.<sup>79</sup> We also agree with those approximations as regards visibility of the Pool from the second of the two main habitable rooms of the Pool House.

67 Mr Neaylon agreed that the dividing wall which separated the two main habitable rooms was the main reason why 100% of the Pool and the surrounding pool area could not be seen when inside the Pool House.<sup>80</sup> The nib wall in the second room was another contributing factor with respect to reduced visibility of the Pool and the surrounding pool area from within the second main habitable room.

68 In contrast, when located in the open yard area behind the Dwelling, looking in an easterly direction towards the Pool, through the glass safety barrier which separates the Dwelling from the Pool Area, 100% of the Pool and the Spa and the surrounding pool area was visible from this location on the Land. There were no obstructions of note which interfered with the visibility of the Pool and the Spa when located in this area of the back garden.

### The Notice

69 The Notice was issued on behalf of the Council by its duly authorised delegate<sup>81</sup> Mr Neaylon. Mr Neaylon has been an employee of the Council for sixteen years and currently holds the position of Development Officer, Building. He is an Accredited professional - building level 2 under the Act.<sup>82</sup> He has been a building surveyor for approximately 23 years.<sup>83</sup> During his employment at the Council, he also ran a business called *Adelaide Swimming Pool Inspections* where he offered swimming pool inspection services for landowners. He would inspect pool barriers and other safety features and advise a landowner of any areas of non-compliance under the Building Rules.<sup>84</sup>

70 The Notice is set out as follows:

**To:** Ms Shirley Brixton (**You**)  
30 Partridge Street  
GLENELG SA 5045

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<sup>79</sup> T15 lines 12-13.

<sup>80</sup> T15 lines 20-23.

<sup>81</sup> This was not in dispute.

<sup>82</sup> At the time of the hearing.

<sup>83</sup> Ibid.

<sup>84</sup> Exhibit R7, [1].

**From:** City of Holdfast Bay (the **Council**)  
Brighton Civic Centre  
24 Jetty Road  
BRIGHTON SA 5048

**WHEREAS:**

1. You are the registered proprietor of the land comprised within Certificate of Title Register Book Volume 5667 Folio 694 known as 30 Partridge Street, Glenelg SA 5045 (the **Land**).
2. The Land is located in a General Neighbourhood Zone under the Planning and Design Code.
3. A pool house adjacent to a large outdoor swimming pool and spa is located on the Land (the **Pool House and Pool and Spa** respectively). The Pool House is a Class 1a building as that term is defined in the Building Rules under the *Planning, Development and Infrastructure Act 2016* (the Act).
4. The Pool House and Pool were constructed pursuant to the development approval in DA 110/480/14 (the **2014 Approval**). Building Rules consent for the 2014 Approval was granted by a private certifier. The 2014 Approval included a swimming pool safety barrier between the Pool House and the Pool which complied with the Building Rules in force at the time, particularly, in compliance with AS1926.1-2012 and AS1926.2-2007.
5. On 2 March 2023, development approval was issued to DA 23004601 under the Act for the Spa to be added to the outdoor pool area (the 2023 approval), adjacent to the Pool. Building consent for the 2023 approval was granted by a building certifier and not the Council. The 2023 approval comprised the construction of the Spa only and did not include any other variations to the 2014 approval.
6. Notification of the commencement of building work for the Spa was provided under the Act on 17 May 2023.
7. On 19 October 2023, Mr Richard Neaylon, an authorised officer of the Council and accredited professional – building level 2, undertook an inspection on the Land. Mr Neaylon observed that the Pool House had sliding doors opening directly into the safety zone of the Pool and Spa. Mr Neaylon formed the opinion that the lack of swimming pool safety barrier between the Pool House and the area surrounding the Pool and Spa constituted a breach of section 156(4) of the Act as well as being contrary to the 2014 approval and the 2023 approval.
8. Later that day, Mr Neaylon contacted the building certifier for DA 23004601 concerning the lack of a barrier. The building certifier then approved the removal of the barrier as a ‘minor’ variation under regulation 65 of the *Planning, Development and Infrastructure (General) Regulations 2017* and asserted that it complies with the Building Rules under the Act.
9. On 7 November 2023, Mr Neaylon issued an enforcement notice to You pursuant to section 213 of the Act.

10. On 16 November 2023, the enforcement notice was withdrawn on a without prejudice basis for the purposes of engaging with your legal representatives on this matter.
11. The Council remains of the view that the lack of a swimming pool safety barrier between the Pool House and the Pool is contrary to section 156(4) of the Act.
12. The Council is a designated authority under Part 18 Division 1 of the Act.
13. Section 213(1) of Act states:

*213(1) If a designated authority has reason to believe on reasonable grounds that a person has breached this Act or the repealed Act, the designated authority may do such of the following as the designated authority considers necessary or appropriate in the circumstances:*

- (a) direct a person to refrain, either for a specified period or until further notice, from the act, or course of action, that constitutes the breach;*
- (b) direct a person to make good any breach in a manner, and within a period, specified by the relevant authority;*
- (c) take such urgent action as required because of any situation resulting in the breach.*

14. The Council has reason to believe on reasonable grounds that You have breached section 156(4) of the Act as follows:

14.1 section 156(3)(a) of the Act provides that the regulations may require a designated owner of a swimming pool or building to ensure that designated safety features are installed and maintained in accordance with the prescribed requirements.

14.2 Regulation 6(1)(b) of the *Planning, Development and Infrastructure (Swimming Pool) Regulations 2019 (Swimming Pool Regulations)* provides that the Pool and Spa must have designated safety features which meet:

*“the requirements relating to the construction and safety of swimming pools under the Building Code, as it applied at the time the application for a relevant consent or approval was made (being an application that related to the construction of the swimming pool or to some other form of building work where designated safety features are relevant).”*

14.3 Regulation 6(1a) of the Swimming Pool Regulations provides that the requirements in regulation 6(1) are prescribed for the purposes of section 156(3)(a) of the Act and that the designated owner of a swimming pool must ensure that designated safety features are installed and maintained in accordance with the relevant requirements under regulation 6(1).

14.4 Section 156(1)(a) defines ‘designated owner’ to include You.

14.5 Section 156(4) provides that a person who contravenes, or fails to comply with, a requirement under this section (including a requirement prescribed by the regulations) is guilty of an offence.

- 14.6 You have breached section 156(4) of the Act in that you have failed to install and maintain the required swimming pool safety barrier between the Pool House and the Pool and Spa area. In particular:

the Pool and Spa area is accessible on the northern side by sliding glass doors located in the southern section of the Pool House;

the sliding doors within the Pool House do not comply with the Building Code as it applies to both the 2014 approval and the 2023 approval as a person can access the Pool and spa area without being required to pass through a child resistant gate and barrier as required by AS1926.1--2012 and AS1926.2--2007.

**NOW TAKE NOTICE** that you are directed to:

1. Install a compliant safety barrier required between the Pool House and the Pool and Spa area which complies with AS1926.1--2012 and AS1926.2--2007 **within two (2) months from the date of this notice.**

**Dated** 17 April 2024

### **Grounds of Appeal**

71 The Appellant's originating appeal contained five grounds of appeal which were:

1. The Notice is defective, and ought to be quashed as the Respondent has not specified or particularised in the Notice which prescribed requirement under AS1926.1-2012 and AS1926.2-2007 it alleges the Appellant has not complied with such to amount to a contravention of Section 156(4) of the PDIA,<sup>85</sup> which specification or particularisation is necessary before the Council may validly impose a direction to the Appellant pursuant to Section 213.
2. The Notice is defective, and ought to be quashed as the Appellant has not breached the PDIA.
3. The Notice is defective and ought to be quashed as the Respondent is obliged to accept the building rules consent granted by PBS Building Certifiers as the relevant authority on 27 February 2023 (**the BRC**) which consent assessed the swimming pool safety barrier on the Land, relevantly including diagrams and a statement that the 'existing pool fence to be removed', as conforming with the Building Rules as defined under the PDIA.
4. The Notice is defective and ought to be quashed as the Appellant has complied with the development approval granted by the Respondent as the relevant authority on 3 March 2023 (DA 23004601) (**the Approval**) which approval affirmed the BRC.
5. The Notice ought to be quashed as it constitutes an impermissible collateral challenge to the BRC and the Approval.

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<sup>85</sup> PDIA was defined in the appeal notice as *Planning, Development and Infrastructure Act 2016* (SA).

72 At the hearing, the appellant no longer pressed grounds 3 and 5.<sup>86</sup>

### **The appellant's case**

73 The appellant only pressed grounds 1, 2 and 4 at the hearing. She argued that the Notice should be quashed based on the grounds articulated in ground 2 alone. Otherwise, she submits that the Notice should be set aside on grounds 1 and 4.

### **Ground 2**

74 The appellant contends that she has not breached the Act and therefore the Notice is invalid and should be quashed. She advances eight reasons in support of that contention.

75 First, she submits that her compliance with the Act and the SPS Regulations must be assessed by reference to the relevant Australian Standards, namely AS 1926.1 and AS 1926.2. The Act and the SPS Regulations require the designated safety features on the Land to comply with the relevant provisions of the Building Code in force at the time the applications for consent or approval were made. Performance requirement 2.7.1 of the Building Code will be satisfied with respect to a swimming pool associated with a Class 1 building, if it has safety barriers installed in accordance with the relevant Australian Standards, namely AS 1926.1 and AS 1926.2, which is a *deemed to satisfy* provision of the Building Code. The appellant therefore contends that if the safety barrier that is present on the Land complies with the Australian Standards, it will comply with the Building Code and therefore also the Act and SPS Regulations.

76 Secondly, the appellant submits that the safety barrier in place on the Land which separates the Pool Area from the Dwelling, complies with, and is in accordance with, the relevant Australian Standards. She contends that the required designated safety features have been installed and are being maintained in accordance with the prescribed requirements and nothing further is required.

77 Thirdly, and related to the previous reason, the appellant submits that the Pool House is a free-standing building within the Pool Area and is inaccessible *other than* through the child resistant gate within the existing safety barrier. The external walls of the Pool House constitute part of the barrier restricting access to the Pool and the Spa as these external walls do not contain any openings (e.g., doors or windows). The remainder of the barrier is the glass pool fence which extends from the southeastern corner of the Pool House, around the pool paving to the southwestern corner of the Pool House. Anyone who wishes to access the Pool Area, including the Pool House, and indeed the Pool and the Spa, can only do so by *first* passing through the child resistant gate which forms part of the existing barrier.<sup>87</sup>

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<sup>86</sup> Appellant, Written submissions of appellant, dated 16 August 2024, [5].

<sup>87</sup> Appellant, Written submissions of appellant, dated 16 August 2024, [8].



78 Fourthly, the appellant submits that none of the four diagrams shown in Figure 2.1 in AS 1926.2-2007 (shown above)<sup>88</sup> apply to the situation that exists on the Land. She said that it does not follow that the existing barrier in place on the Land does not comply with AS 1926.2-2007. Each of these diagrams includes a pool, a barrier and a building. In diagrams (a) and (b), the pool is surrounded by a barrier and is physically separated and isolated from the adjacent building shown in the diagram. That is not the case on the Land because there is no barrier separating or isolating the building (i.e., the Pool House) from the Pool and the Spa.

79 The appellant says that there is some superficial similarity with the situation on the Land as depicted in diagrams (c) and (d) in Figure 2.1. This is because the building shown in each of these two diagrams is not physically separated from the pool by way of an isolating fence or barrier. That is the case on the Land at present given the Pool House is not physically separated or isolated from the Pool and Spa by a fence or a barrier. In diagram (c) however there is no access at all *from the building* to the pool and the surrounding pool area. That is not the case at present on the Land either because direct access to the Pool and the Spa can be gained from the Pool House. In diagram (d) there is a child resistant openable portion of a window in the wall of the building but, once again, there is no access at all *from the building* to the pool and the surrounding pool area in diagram (d). That is not the case at present on the Land as direct access to the Pool and the Spa can be obtained from the Pool House.

80 The appellant submits that the difference between the existing situation on the Land and what is depicted in diagrams (c) and (d) is that the building shown in each of these two diagrams can be accessed from *outside* the pool area. She submits that neither diagram (c) nor (d) are relevant to the facts of this case because presently there is no access provided to the Pool House from *outside* the existing safety barrier. The distinction being that there is no way a person can access the Pool House on the Land without *first* going through the child resistant safety gate located within the pool fence which forms part of the barrier. In diagrams (c) and (d), a person could enter the building depicted therein without *first* going through a child resistant safety gate. In diagrams (c) and (d), once a person has gained access to the building, there is no way to *then* access the pool from the building. The appellant accepted that if there was a door which led to the Pool House at the Land which was accessible from *outside* the safety barrier (as is the case in diagrams (c) and (d)), that that scenario would not comply with AS 1926.2-2007. That is because, in that situation, the Pool House could be entered without first going through a barrier, and once inside the Pool House there would be no barrier between the Pool House and the Pool and Spa.<sup>89</sup>

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<sup>88</sup> See paragraph 51.

<sup>89</sup> T93 lines 23-33.

81 Fifthly, the appellant submits that the situation at the Land is not a ‘typical example’ of a barrier location for the purposes of clause 4.2 of AS 1926.2-2007. She argues that this does not mean the barrier on the Land is contrary to AS 1926.2-2007. She argues that consideration must be given to whether the remaining text of clause 4.2 is satisfied by the barrier arrangement that has been installed on the Land, regardless of the diagrams show in (a) – (d).<sup>90</sup> She argues that there are only three requirements of clause 4.2, namely:

1. that a child resistant door set cannot be installed in a barrier for an outdoor pool;
2. that the openable portion of any window in a barrier must comply with AS 1926.1; and
3. that a balustrade on a balcony projecting into any non-climbable zone must comply with AS 1926.1.

82 In relation to each of these three requirements, the appellant submits that none are offended in this case. There is no child-resistant door set in the barrier that separates the Pool Area from the Dwelling. There is no openable window in this barrier either. There is no balcony involved in the circumstances of this case. The appellant argues that the fact that the barrier in place is not depicted in any of the four diagrams in Figure 2.1 in clause 4.2 of AS 1926.2-2007 “*is of little moment*”.<sup>91</sup> She says that the four diagrams are said to be “*typical examples of compliant barrier locations*”.<sup>92</sup> The Standard cannot be said to preclude other forms of compliant barriers. She submits “*in a case which does not fit into any of the diagrams in Figure 2.1, the question is whether the proposed barrier meets the intent of clause 4.2 as expressed by the language used in that clause*”.<sup>93</sup>

83 Sixthly, the appellant places considerable weight on the information contained in the preface to AS 1926.2-2007 which, for convenience, is set out once more below:

The objective of this Standard is to assist pool users/owners in avoiding pool-related drowning by providing options for the location of pool barriers, which are designed to deny, delay or detect unsupervised entry to the swimming pool area by young children.<sup>94</sup>

(Our emphasis).

84 As previously identified, the term “pool area” is defined in the Standards to be the area that contains the pool and is enclosed by a barrier. The appellant says that a barrier is in place which prohibits entry to the Pool Area on the Land and so the objective of the Standard is therefore met. She contends that the Land within

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<sup>90</sup> Appellant, Written submissions of appellant, dated 16 August 2024, [57].

<sup>91</sup> Appellant, Written submissions of appellant, dated 16 August 2024, [81].

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Exhibit R1 at [101].

the existing barrier is the “pool area” for the purpose of AS 1926.2-2007.<sup>95</sup> At present, access cannot be gained to the swimming *pool area*, (as that term is defined in the Standards), other than through the child resistant barrier that is in place.

85       Seventhly she contends that although Appendix B does not encourage buildings to be located within a pool area, it does not strictly prohibit it either. She submits that there is nothing in the Standards which prohibits the Pool House being located *within* the Pool Area. We note however that the buildings and structures referred to in Appendix B of AS 1926.2-2007 are all Class 10 buildings, i.e., tool sheds, garages etc. None of the types of buildings mentioned in Appendix B are Class 1 buildings. We will return to the significance of this in due course.

86       Eighthly, although the 2016 version of the Building Code is not directly relevant to the appeal, in that version of the Building Code, a special provision applied to swimming pool access in South Australia when a habitable room or a building with a habitable room (a Class 1a building) was located *within* a pool area. In that scenario, the 2016 version of the Building Code *required* a compliant safety barrier to be in place between the habitable room or habitable building and the pool itself. This requirement was not in the 2014 version of the Building Code (under which the 2014 Development was assessed). The provision was deleted or removed from the 2019 version (under which the 2023 Development was assessed). The appellant contends that the insertion of this provision and its subsequent deletion supports her submission that a barrier is not required to be installed between a habitable room (or a Class 1a building) that is located within a pool area, and the pool itself.<sup>96</sup> There was no explanation proffered by either party as to why this provision was inserted and then subsequently deleted from the Building Code.<sup>97</sup>

87       The appellant submits that given (on her case) the barrier on the Land complies with clause 4.2 of AS 1926.2-2007, that the Pool and the Spa have designated safety features in place which comply with the relevant provisions of the Building Code in force at the time the applications were made. She argues therefore that it cannot be the case that she is in breach of r 6(1)(b) of the SPS Regulations and s 156 of the Act. She says that the Notice is defective, and ought to be quashed on this basis alone.

### ***Ground 1***

88       The appellant argued that the Notice is invalid because it does not sufficiently particularise which requirements of the relevant Australian Standards are not satisfied in this case. She argues that the terms of the Notice do not draw any distinction between AS 1926.1-2012 and AS 1926.2-2007. Further, she submits

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<sup>95</sup> Appellant, Written submissions of appellant, dated 16 August 2024, [73]-[74].

<sup>96</sup> Appellant, Written submissions of appellant, dated 16 August 2024, [37].

<sup>97</sup> T55 lines 6-9.

that the Notice fails to identify which provision of the Building Code the Council relies on when alleging a breach of s 156 of the Act. These deficiencies were made apparent following the Council filing its amending response to the originating appeal<sup>98</sup> when, for the first time, she submits, it provided material particulars relied upon by the Council for the purpose of asserting a breach of the Act. The appellant relies on *Sullivan v District Council of Riverton*<sup>99</sup> and submits that an enforcement notice under the planning legislation must be clear and unambiguous in its terms, and a notice which does not achieve this is not a proper notice under the Act.<sup>100</sup> She argues the Notice should be set aside on this additional or alternative basis.

#### **Ground 4**

<sup>89</sup> The appellant has complied with a development approval granted by the Council on 3 March 2023 with respect to the 2023 Development. She submits that the approval *affirmed* the building consent granted by PBS. She argues that the Council cannot issue a development approval on the basis that it complies with the Building Code and subsequently take enforcement action alleging that the development does not comply with the Building Code, absent a judicial determination as to invalidity.<sup>101</sup> The appellant relies upon the decision of the Supreme Court of the Australia Capital Territory in *Capital Recycling Solutions Pty Ltd v Planning and Land Authority of the Australian Capital Territory (Capital Recycling Solutions)*.<sup>102</sup> In *Capital Recycling Solutions*, the Planning and Land Authority of the ACT granted approval to a development application (the first decision) and subsequently voluntarily reviewed this decision, resulting in a second decision which purported to change the first decision by refusing the development application. The plaintiff successfully sought declaratory relief that the second decision of the Authority was void *ab initio* on the basis that it had no jurisdiction to make it. McWilliams AsJ stated:

There is a line of authority to the effect that invalidity is required to be established by a judicial rather than an administrative determination, and any decision tainted by jurisdictional error is valid and effective in law until such a determination is made. Examples are to be found in: *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 per Aikin J at 277; *Ousley v The Queen* (1997) 192 CLR 69 (*Ousley*) per Gummow J at 130-131; and *R v Balfour; ex parte Parkes Rural Distributions Pty Ltd* (1987) 17 FCR 26 at 33.

If the position were otherwise, the operation of the vast number of administrative decisions made daily would be compromised, and the system would be unworkable. Indeed, to paraphrase the legal philosopher Hans Kelsen, the system would be reduced to a ‘state of anarchy’: see *State of New South Wales v Kable* [2013] HCA 26; 252 CLR 118 per Gageler J at [40] quoting Hans Kelsen.

That statement has particular force in a planning context. As raised with the parties during the hearing, no one would be in a position to build or develop with any

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<sup>98</sup> Respondent, Amended response to originating appeal notice by respondent (undated).

<sup>99</sup> (1997) 69 SASR 234.

<sup>100</sup> (1997) 69 SAS 234, at [246]

<sup>101</sup> Appellant, Written submissions of appellant, dated 16 August 2024, [98].

<sup>102</sup> [2019] ACTSC 58.

certainty in the Territory if a development approval granted on one day were able to be unilaterally treated as void and of no effect by the Authority the next day.

The proposition that invalidity is to be established by judicial determination in a planning context is consistent with what has been well-established elsewhere: see, for example, *F Hannan Pty Ltd v Electricity Commission of New South Wales [No 3]*, (1985) 66 LGRA 306 (*Hannan*) per McHugh JA at 327; and, *GPT Re Ltd v Belmorgan Property Development Pty Ltd* (2008) 72 NSWLR 647 (*GPT Re Ltd*) per Basten JA at [90].<sup>103</sup>

90 The above observations of the court in *Capital Recycling Solutions* have been held to apply to all planning systems in Australia.<sup>104</sup>

91 The appellant submits that the Court ought to quash the Notice based on the Council's failure to take issue with the barrier at the time of the grant of the development approval in 2023. The appellant spent her time and money in implementing the approval which she says she was entitled to rely upon.<sup>105</sup>

92 She argues that if the Council had concerns about the approval, these matters ought to have been raised and dealt with by the Council before it allowed her to undertake the development in accordance with the approval which it had granted.<sup>106</sup> She submits that until such time as the development approval is quashed or determined to be invalid, she is entitled to rely upon it and that the Council wasn't permitted to issue the enforcement notice on that basis.<sup>107</sup>

## The Council's case in response

### *Ground 2*

93 The Council made six points in response to the submissions made by the appellant.

94 First, the Council contends that the appellant's approach to the interpretation of the Australian Standards is wrong and argues that the Australian Standards must be considered in context and read as a whole. It is contrary to the established principles of statutory interpretation<sup>108</sup> that the appellant need only satisfy the requirements of the three criterion within the text of clause 4.2 of AS 1926.2-2007 with respect to the location of the barrier on the Land and to otherwise disregard the other provisions of the Standard, including the preface which sets out the *objectives* of the Standards, together with the *diagrams* depicted in Figure 2.1 and the *guidance notes* provided in Appendix B.

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<sup>103</sup> [2019] ACTSC 58, [20] – [23].

<sup>104</sup> *Charara v Ku-ring-gai Council* [2019] NSWLEC 183, at [36].

<sup>105</sup> Appellant, Written submissions of the appellant, dated 16 August 2024, [101].

<sup>106</sup> T108 lines 29-32.

<sup>107</sup> T63 lines 7-10.

<sup>108</sup> *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355.

95 Secondly, the Council argued that the appellant has adopted a narrow, selective and literal reading of the Standards. When read in context and as a whole it was argued that it is clear that direct access to an outdoor pool from a Class 1 building is prohibited<sup>109</sup> and all four of the diagrams shown in Figure 2.1 of AS 1926.2-2007 support that contention.

96 Thirdly, the glass sliding doors of the Pool House do not comply with AS 1926.2 in any event. Up until 2011, it was permissible for a child resistant door set to be included within a barrier for an outdoor pool. A child resistant door set is defined in AS 1926.2-2007 as “a door set that comprises a door, door frame, self-closing device and self-latching device, that is designed to provide an access way from the building to an outdoor pool”. Clause 4.2 of AS 1926.2-2007 provides that a child resistant door set can no longer be installed in or form part of a barrier for an outdoor pool.<sup>110</sup> That was the case when the applications were made for both the 2014 Development and the 2023 Development. The glass sliding doors in the Pool House which now provide direct access to the Pool and the Spa are not child-resistant in that they do not contain a self-closing or self-latching device. The Council therefore submits that the fact that a child resistant door set is no longer permitted in a barrier for an outdoor pool supports the Council’s case that direct access to the Pool and the Spa, through the glass sliding doors of the Pool House, is contrary to the Australian Standards.<sup>111</sup>

97 Fourthly, the Council asserts that the southern wall of the Pool House forms part of the safety barrier to the Pool and the Spa.<sup>112</sup> Given the glass doors are located within that barrier, it is non-compliant<sup>113</sup> (even if they were child resistant). The Council submits that the barrier does not comply with the guidance notes set out in Appendix B either. Appendix B provides that constant adult supervision is essential whenever a young child is within the pool area. The dividing wall within the Pool House impairs the supervision of a child that is located within the Pool and/or the surrounding pool area.<sup>114</sup> Mr Neaylon gave evidence to that effect. He also gave evidence about what he considered Appendix B was seeking to achieve. He said that it sought to ensure that a person supervising a child would have clear and unobstructed vision of the *entire* pool. He said that in its present form, there were sections of the Pool and the surrounding pool area which were not clearly visible from certain vantage points within the two main habitable rooms of the Pool House. As a result, he opined that Appendix B was not satisfied.<sup>115</sup>

98 Fifthly, the Council submits that the Court should reject the appellant’s submission that the insertion and subsequent deletion of a specific provision in the

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<sup>109</sup> Respondent, Outline of submissions, dated 16 August 2024, [50] and T56 lines 17-20.

<sup>110</sup> Exhibit R1 at [104].

<sup>111</sup> Respondent, Outline of submissions, dated 16 August 2024, [38]-[40].

<sup>112</sup> *Ibid*, [48].

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid*, [51]-[53].

<sup>115</sup> T16 lines 5-30.

2016 version of the Building Code which applied in South Australia<sup>116</sup> supported a finding that a barrier was no longer required between the Pool House and the Pool and Spa. The Council acknowledged that such a provision once existed in the 2016 version of the BCA, but that when each of the four diagrams depicted in Figure 2.1 of AS 1926.2-2007 are considered, that such a provision was now unnecessary and superfluous. Mr Neaylon agreed.<sup>117</sup> The Council contended that in so far as the building shown in each of these diagrams in Figure 2.1 represented a habitable building or a building containing habitable rooms, there was in fact no direct access to the pool provided in *any* of the four examples shown. It was submitted:

I just wanted to address the issue of that SA variation which was not in the 2014, [was included] in the 2016 version and then removed in the 2019 version. Mr Neaylon's evidence was to the effect that he didn't know why it was put in and taken out and I think it's fair to say that nobody does, we've searched for an explanatory memorandum or any other document to try to understand it and can't find anything. But it was his evidence that it was superfluous, that it was unnecessary because the current standard as we have it for the location of barriers for outdoor pools covered what was included by that SA variation in 2016. In my submission that's the likely reason as to why it was taken out, because it was unnecessary. What my learned friend tries to suggest is the opposite, it was taken out because it's now permitted and I would say well when read in context of the objective of the legislation and everything else that, that can't be the explanation.<sup>118</sup>

99 The respondent argued that the existing situation on the Land does not comply with the Australian Standards given there is no barrier between the Pool House and the Pool and the Spa on the Land. Therefore, the designated safety features with respect to the Pool and the Spa are not in accordance with the requirements relating to the construction and safety of swimming pools under the Building Code as it applied at the time the application was made for the 2023 Development. The consequence of this is that the appellant has breached and is currently in breach of the requirements of r 6(1)(b) of the SPS Regulations and s 156 (4) of the Act.

### **Ground 1**

100 The Council agrees that an enforcement notice issued under the Act must be clear and unambiguous in its terms and that it must specify with reasonable particularity the alleged breaches and the directions which must be complied with. The Council submits that the Notice identifies that the alleged breach of the Act is a breach of s 156(4). The Notice particularises that the breach includes a failure to comply with the *Australian Standards*, namely AS 1926.1-2012 and AS 1926.2-2007, by its reference to the removal of the barrier previously approved in 2014 (clauses 4 and 8 of the Notice). The Notice identifies that a lack of a safety barrier

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<sup>116</sup> Which provisions required a barrier to be in place between a pool and a habitable room or a building containing an habitable room within a pool area.

<sup>117</sup> T34 lines 30-38 and T35 lines 1-21.

<sup>118</sup> T55 lines 1-20.

between the Pool House and the Pool and Spa is contrary to the Act (clause 11 of the Notice).

101 The Council rejects the proposition that it ought to have provided a “*level of granularity in the detail of the alleged breach*”.<sup>119</sup> Further, it argues that the Notice makes clear what measures are required to be taken and that there could be no doubt that reinstatement of the barrier approved in the 2014 Development or an alternative compliant barrier would achieve compliance with the Act. In any event, it was submitted that it would be inappropriate for the Council to direct *precisely* where a compliant safety barrier ought to be installed on the Land given there are multiple options available to the appellant.<sup>120</sup> The only other way in which the Notice could perhaps have been even clearer, if that was necessary, would have been for it to have recited the entirety of the relevant *Australian Standards*. Consistent with the Council’s case, it is not just clause 4.2 of AS1926.2-2007 which must be considered, rather it is the whole of the Standards which apply.<sup>121</sup> The Council submits that this level of detail was not necessary with respect to the Notice.

102 Finally, the Council argued that there was a significant amount of correspondence between the parties prior to the Notice being issued, and the Notice was able to be readily understood by the appellant given that background and context.<sup>122</sup> Mr Neaylon gave evidence about what transpired prior to the Notice being issued to Ms Brixton<sup>123</sup> and that it should not be accepted that the Notice came out of the blue.<sup>124</sup>

#### **Ground 4**

103 In response to this ground of appeal, the Council made three alternative contentions. First, it submitted, relying on the decision of this Court in *Cairo v The Corporation of the City of Norwood Payneham & St Peters & Anor (Cairo)*<sup>125</sup> that it was *required* to accept the building consent granted by PBS to the 2023 Development.<sup>126</sup> Therefore, the Council submitted the issuing of the Notice did not constitute a revisiting of an earlier decision, namely the Development Approval. Secondly, it submitted that irrespective of any development approval or authorisation, the appellant was obliged to comply with the requirements imposed by s 156 of the Act and the SPS Regulations.

104 Thirdly, the Council argued that the Court could consider and determine a collateral challenge against the decision by PBS to grant a building consent to the 2023 Development as it is the subject of jurisdictional error and a nullity because

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<sup>119</sup> Respondent, Outline of submissions, dated 16 August 2024, [59].

<sup>120</sup> *Ibid*, [61].

<sup>121</sup> T75 lines 21-28.

<sup>122</sup> *Ibid*, [63].

<sup>123</sup> T26-T29.

<sup>124</sup> *Amberich Pty Ltd v The City of Mount Gambier* [2013] SAERDC 12.

<sup>125</sup> [2018] SAERDC 11, [24]-[37].

<sup>126</sup> Respondent, Outline of submissions, dated 16 August 2024, [78].



it is so illogical or irrational that no rational decision maker could have formed the opinion that no barrier was required between the Pool House and the Pool and the Spa.<sup>127</sup> The Council contends that it can pursue a collateral challenge in these proceedings against the decision to grant building consent to the 2023 Development in circumstances where, first, the Court is properly seized of a justiciable controversy regarding the consent by virtue of a number of the appellant's grounds of appeal<sup>128</sup> (at the hearing this was limited to ground 4 of the appeal only). Secondly, consistent with the decision of the Supreme Court in *Jacobs v Onesteel Manufacturing Pty Ltd v Workcover Corporation of SA (Jacobs)*,<sup>129</sup> where a collateral challenge was permitted, the grounds of challenge in this case do not involve the adducing of substantial evidence and that the proper parties are before the Court.<sup>130</sup> Thirdly, it was argued that there is no statutory provision that indicates or suggests that a collateral challenge ought not be permitted in this instance.<sup>131</sup> The Council submits that a successful collateral challenge to the building consent would not render the approval granted to the 2023 Development a nullity, rather it would mean that ground 4 of the appeal could not succeed.<sup>132</sup> It was submitted that the decision of the certifier to grant a building consent to the 2023 Development lacked an evident and intelligible justification in circumstances where:

1. the configuration for safety barriers enclosing the swimming pool area in the 2014 Development was designed in compliance with AS 1926.2-2007;
2. removal of a portion of the safety barrier on the western side of the swimming pool (which was the subject of the 2014 Development) and repositioning of the western barrier such that direct access could be obtained from the Pool House to the Pool resulted in non-compliance with AS 1926.2-2007;
3. the mandatory terms of AS 1926.2-2007 applying to outdoor pools are clear and readily interpreted on their face; and
4. the building consent granted to the 2023 Development did not contain a properly documented performance solution in accordance with the requirements of the NCC (Part A2.2(4)) and is not in accordance with s 102(1)(b) of the Act.<sup>133</sup>

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<sup>127</sup> Ibid, [79].

<sup>128</sup> Ibid, [84.1].

<sup>129</sup> [2006] SASC 32, [93].

<sup>130</sup> Respondent, Outline of submissions, dated 16 August 2024, [84.2].

<sup>131</sup> Ibid at [84.3].

<sup>132</sup> Ibid at [86].

<sup>133</sup> Ibid at [90].

## Determination

### Ground 2

105 Under Ground 2, the appellant asserts that she has complied with the Act. To succeed on the appeal ground, she must establish that:

1. she has complied with the requirements imposed under Part 2.7.1 of the Building Code (without resort to AS 1926.1-2012 and AS 1926.2-2007); or
2. she has complied with the requirements imposed by AS 1926.1-2012 and 1926.2-2007 and therefore has complied with the requirements imposed under Part 2.7.1 of the Building Code.

### *Approach to interpretation of the provisions of the NCC*

106 The structure of the Act and the SPS Regulations is that compliance with those legislative instruments is determined by the content of the Building Code. Section 156 of the Act refers to designated safety features which is defined in s 3(1) as being swimming pool safety features. That term is defined as a fence, barrier or other structure or equipment prescribed by the regulations.<sup>134</sup> The SPS Regulations specifically refer to the provisions of the Building Code in prescribing the designated safety features that apply under the Act in relation to swimming pools that are approved, constructed or installed *after* 1 July 1993.<sup>135</sup> The Building Code is a legislative instrument as defined in s 4 of the *Legislation Interpretation Act 2021* (SA) on the basis that it may be considered to be “*any [other] instrument of a legislative character made or in force under [the] Act*”.<sup>136</sup>

107 In *Garden College v City of Salisbury*<sup>137</sup> this Court set out the approach to statutory interpretation when considering the provisions of a statutory instrument made under the Act, which, in that case, concerned the Planning & Design Code. We respectfully adopt the Court’s summary of the principles in that case<sup>138</sup> and consider that they have equal application regarding this matter with respect to the interpretation of the provisions of the Building Code, also a statutory instrument in force under the Act. The Court must have regard to the text, context and statutory purpose of the relevant provisions when interpreting the provisions of the Building Code.<sup>139</sup> It was only those provisions of Volume Two of the Building Code dealing with swimming pool safety specifically which were included in the respondent’s tender book. Volume Two of the Building Code is almost six hundred pages long. While the entire document was not tendered by either party, in order for the Court to have proper regard to the text, context and statutory purpose of the most

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<sup>134</sup> *Planning, Development and Infrastructure Act 2016* (SA), s 3(1)

<sup>135</sup> The Building Code is defined in s 3 of the Act to mean an edition of the *Building Code of Australia* published by the Australian Building Codes Board in the National Construction Code series. Section 79 of the Act provides that the Building Code, as in force from time to time, applies for the purposes of the Act, subject to certain qualifications.

<sup>136</sup> *Legislation Interpretation Act 2021* (SA), s 4.

<sup>137</sup> *Garden College v City of Salisbury* [2022] SAERDC 10.

<sup>138</sup> [2022] SAERDC 10, [22]-[35].

<sup>139</sup> [2022] SAERDC 10, [63].

pertinent provisions of the Building Code it was necessary for other provisions of the Building Code to be considered and referred to. On hearing any proceedings, s 21(1)(b) of the *Environment Resources & Development Court Act 1993* (SA) enables this Court to inform itself as it sees fit.

*Compliance with the requirements under the Building Code*

108 The performance requirements under the Building Code which apply, namely P 2.7.1, outline the *minimum* necessary standards with respect to the barrier that must be satisfied in this case.<sup>140</sup> The substance of the appellant's case is that there is an existing barrier on the Land which satisfies the provisions of the Australian Standards, a deemed to satisfy solution under the Building Code (Part 3.10.1.0). We acknowledge that performance requirement P2.7.1 will be satisfied if the deemed to satisfy provision is met. However, we consider that the correct approach in determining whether r 6(1)(b) of the SPS Regulations has been complied with, is to *first* consider the relevant provisions of the Building Code (P2.7.1 together with Part 3.10.1.0) *before* considering and applying the provisions of the Australian Standards. To approach the assessment the other way around, which appears to be what the appellant has done, namely that the provisions of the Australian Standards are considered and applied *first* before considering the provisions of the Building Code, is, to use a colloquialism, to put the cart before the horse.

109 It is convenient to outline once again the applicable Building Code provisions. When considering these provisions, it is necessary to keep in mind their objective which is to safeguard young children from drowning or injury in a swimming pool (O2.7):

**Performance Requirements**

**P2.7.1 Swimming pool access**

A barrier must be provided to a *swimming pool* and must –

- (a) be continuous for the full extent of the hazard; and
- (b) be of a strength and rigidity to withstand the foreseeable impact of people; and
- (c) restrict access of young children to the pool and the immediate pool surrounds; and
- (d) have any gates and doors fitted with latching devices not readily operated by young children, and constructed to automatically close and latch.

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<sup>140</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A2 Compliance with the NCC, A2.4, A combination of solutions (Explanatory Information) at [17].

## Acceptable Construction Manuals

### 3.10.1.0

- (a) *Performance Requirement 2.7.1* is satisfied for a *swimming pool* with a depth of water more than 300mm and which is associated with a Class 1 building, **if it** has safety barriers installed in accordance with AS 1926.1 and AS 1926.2

...

(Our emphasis)

Three issues arise from these provisions.

They are:

- (1) what is the hazard for the purpose of P2.7.1(a)?
- (2) what does the *immediate pool surrounds* mean for the purpose of P2.7.1(c)?
- (3) what does *associated with a Class 1 building* mean for the purpose of 3.10.1.0?

#### What is the hazard (P2.7.1(a))?

110 P2.7.1(a) states that a barrier provided to a swimming pool must be continuous for the full extent of *the hazard*. The hazard must be taken to be a reference to the swimming pool itself, in this scenario that is the Pool and the Spa. They are the only hazards which could result in a young child drowning which is referred to in the relevant objective (O2.7).<sup>141</sup> It is therefore a requirement of the Building Code that any barrier must be continuous for the full extent of the Pool and the Spa on the Land.

#### What are the *immediate pool surrounds* (P2.7.1(c))?

111 P2.7.1(c) provides that the barrier must not only restrict access of young children to the pool but, in addition, the barrier must also restrict access to the *immediate pool surrounds*. P2.7.1(c) could have only required a barrier to be installed so as to restrict access to the pool itself. However, it is an *additional* requirement that the barrier must also restrict access to the *immediate pool surrounds*. These mandatory technical provisions deliberately include this additional requirement with respect to a barrier. It is therefore necessary to consider what is meant by the phrase the *immediate pool surrounds* in P2.7.1(c).

112 The NCC does not provide a definition for this phrase, nor any guidance as to how the phrase ought to be interpreted. It does not define the boundaries or limitations of or the specific features of what the *immediate pool surrounds* of a swimming pool may be or might include. As the NCC itself identifies within the governing requirements, where a word is not defined in the NCC, the common

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<sup>141</sup> NCC 2019 Volume Two, Amendment 1, Section 2 Performance Provisions at [71].

meaning of the word should be used.<sup>142</sup> That is consistent with the rules of statutory interpretation in any event where a term is not defined in the relevant instrument and it is the correct approach in interpreting the provisions of the Building Code.

113 The term “*surrounds*” is not a defined term in the Macquarie dictionary. The term “*surround*” is defined as:

1. to enclose on all sides, or encompass.
2. to form an enclosure round; encircle.
3. ...
4. a border which surrounds, as of uncovered floor around a carpet.<sup>143</sup>
- ...

(Our emphasis).

114 We consider that the *pool surrounds* of a swimming pool will include the paving, decking or walkway areas around the pool itself, the landscaped areas such as gardens and the like, and possibly any buildings or structures which *border*, or *surround* or are *adjacent to* a swimming pool. We determine that in this case, the area of land that surrounds the Pool and the Spa which is currently enclosed by the existing barrier located on the Land constitutes the *pool surrounds*. What constitutes the immediate pool surrounds requires further consideration.

115 The term “*immediate*” is defined as “*having no object or space intervening; nearest or next: in the immediate vicinity*”.<sup>144</sup> The inclusion of the word *immediate* before the words *pool surrounds* in P2.7.1(c) is instructive. It indicates that if there are other *objects* such as, for example, other buildings or structures, or if there are *spaces* within the pool surrounds which are not *in close proximity to* or in the *immediate vicinity of* the pool itself, that these objects or spaces could not be considered to be located within the *immediate* pool surrounds. Such objects or spaces would be located outside the *immediate* pool surrounds.

116 There is no explanatory information or similar provided in the Building Code which explains why the word *immediate* was included before the words *pool surrounds* in P2.7.1(c). The inclusion of this term must serve a purpose. It is a limiting term. We consider that this purpose is to reduce in size the area of land surrounding a swimming pool that is required to be enclosed by a barrier. In effect, it seeks to reduce in size the area which would be required to be under supervision or surveillance should a young child be located either within the pool or the areas in the immediate vicinity of the pool, i.e., the paving and decking areas which

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<sup>142</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation, *Explanatory Information*, at [15].

<sup>143</sup> *Macquarie Dictionary* (online at 29 January 2025) ‘surround’, (def 1, 2 and 4).

<sup>144</sup> *Macquarie Dictionary* (online at 29 January 2025) ‘immediate’ (def 4).

*immediately* surround the pool itself. That has the consequence that it limits the risk to young children to an area where the child can be under supervision or surveillance. Too large an area would reduce the effectiveness and ability of supervision or surveillance of a young child.

117 That finding is *supported* by the informative provisions in Appendix B which provides:

The distance of the barrier from the pool should take into consideration a safety margin sufficient to discourage diving and jumping from the barrier into the pool. The barrier should be located to enable adult supervision from within the pool area. Whenever a young child is inside a pool area, constant supervision is essential.<sup>145</sup>

118 While we accept this is an informative provision (for information and guidance purposes only), it emphasises that a barrier ought to be in close proximity to the pool, subject only to ensuring the distance is far enough away so as to ensure that a person cannot dive or jump into the pool from the barrier itself.

119 Furthermore, we have determined that when considering what may constitute the *immediate* pool surrounds, it is the area of land that would be intended for activities *directly related* to the swimming pool itself, such as swimming, or poolside seating, sunbathing and the like. This would generally only include the paving and decking areas and lawn in close proximity to or in the immediate vicinity of the pool itself. Any area beyond this would not be located within the *immediate pool surrounds*. It is consistent with the objective of the performance requirements which are to safeguard against young children drowning that a child cannot enter through a barrier on the land, which on the face of it prevents access to a swimming pool, with the child then being able to wander off for perhaps ten, twenty or thirty metres towards the pool. The child may be able to wander some distance away from the barrier through which they have passed. The child may no longer be visible (i.e., there could be vegetation or structures in place between the barrier and the pool which could reduce or obscure visibility) with the child no longer being able to be adequately supervised.

120 In considering what the *immediate* pool surrounds may be, the proximity of the pool to the relevant object or space in question is clearly an important factor, but so too is the *use* to which the objects or spaces within the pool surrounds may be put. With respect to a Class 1a building located within the pool surrounds of a swimming pool, such as, for example; a sleepout, a granny flat, ancillary accommodation, a pool house, these buildings, and the use to which they are put, cannot be said to be *directly related* to the pool itself. This is because such buildings contain habitable rooms, including rooms that may be used for *normal domestic activities*, such as bedrooms, living rooms, lounge rooms, music rooms, television rooms, kitchens, dining rooms, home theatres and the like. These are

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<sup>145</sup> Exhibit R1 at [108].

habitable rooms which have no connection to the activities which may take place in and around the pool itself.

121 In contrast, a pool shed housing the infrastructure for a swimming pool, for example a pool pump (being a Class 10 non-habitable building under the Building Code) is a building or structure that is directly related to the swimming pool itself. It would ordinarily be located in close proximity to a swimming pool also. Such a building would likely be included within the *immediate pool surrounds* given its usual proximity to the pool but also due to the purpose for which the building exists, namely, to house the infrastructure which enables the pool to be used.<sup>146</sup> The difference between a habitable building and a non-habitable building essentially turns on the purpose for which the building is used, the frequency of use and the period of time spent within such buildings. A Class 10 building, being a non-habitable building, would serve a specific function, would be infrequently used and accessed only for short periods of time (i.e., in the example given, to turn the pool pump on/off or to check the infrastructure, etc). This would mean that the non-habitable building would generally not create distractions or become an impediment to the provision of adequate supervision to young children that may be within the pool or the immediate pool surrounds.

122 A building, such as the Pool House, being a Class 1a building, having a floor area of 125m<sup>2</sup>, containing habitable rooms which may be used for the many different kinds of normal domestic activities in the manner described above, cannot be considered to be located within the *immediate pool surrounds*. If we are wrong in placing any reliance or weight on the *use* to which the building in question may be put, we have determined that, in any event, the windows and the glass sliding doors within the southern elevation of the Pool House are themselves *objects* which intervene or intrude upon the pool surrounds such that they cannot be said to be located in the *immediate pool surrounds*. Any area beyond or behind those windows and the glass sliding doors, i.e., the rooms themselves within the Pool House, cannot therefore be considered to be within the *immediate pool surrounds*. The whole of the Pool House is not within the immediate pool surrounds even if the only criteria that were applied was one of proximity to the pool.

#### *Compliance with P2.7.1 of the Code*

123 P.2.7.1 does not express between what objects the barrier must be erected. P.2.7.1 could never be so specific as the objects or buildings or areas beyond the pool and the immediate pool surrounds will be of great variety. Therefore, where the barrier must be is between the pool and the immediate pool surrounds, and any area or object beyond that. While the barrier on the Land may restrict access to the Pool and the Spa from the Dwelling on the Land, it does not restrict access of young children to the *immediate pool surrounds* from the Pool House. There is unimpeded access to the Pool and the Spa from the Pool House, which building

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<sup>146</sup> For example, through enabling the circulation of water in the pool, removing dirt and debris through the filtration of the water in the pool and for distributing chemicals into the pool, etc.

we do not consider to be located within the *immediate* pool surrounds in the context of this site.

124 Mr Neaylon was asked what he considered to be the *immediate pool surrounds* on the Land. In his view, the Pool House together with the glass fencing which surrounded the Pool Area constituted the *immediate pool surrounds*.<sup>147</sup> He did not provide any persuasive reason as to why he came to this conclusion. We disagree with Mr Neaylon's summary of what would constitute the *immediate* pool surrounds in the circumstances of this particular case for the reasons outlined above. We accept that the Pool House is located within *the pool surrounds* given it falls within the area surrounding the Pool which is presently enclosed by an existing barrier, but we do not consider that the Pool House is located within the *immediate pool surrounds*. What will constitute the *immediate pool surrounds* in any particular case will be a question of fact and degree having regard to the specific circumstances of the site under assessment.

125 It could never be the case that a habitable building or room could be considered to be part of the immediate pool surrounds. That conclusion is inescapable from the interpretation of the words "immediate pool surrounds" and the purpose of P2.7.1. That purpose is evident from O2.7 namely that the objective of Part 2.7 is to safeguard young children from drowning or injury in a swimming pool.

126 The consequence of the classification of the Pool House as a habitable building is that it forms part of the detached dwelling and is a Class 1a building under the Building Code. Just as the Dwelling must have a barrier between it and the pool and the immediate pool surrounds, so too must the Pool House. P2.7.1 does not differentiate between different types of Class 1 buildings (which include Class 1a buildings).

127 Given our findings above and for the reasons expanded upon further below, the barrier on the Land does not satisfy performance requirement P2.7.1(a) or (c) of the Building Code.

What does "a swimming pool...which is associated with a Class 1 building" mean in the deemed-to satisfy provision (Part 3.10.1.0)?

128 The assignment of a building classification plays an integral role in the interpretation and application of the provisions of the NCC. The provisions of the NCC cannot be applied without first identifying what the relevant building classification is for the building or scenario that is under assessment. The Dwelling and the Pool House are both Class 1a buildings, as defined. The deemed to satisfy provision, Part 3.10.1.0, refers to a swimming pool that is associated with a Class 1 building. A reference in the NCC to a particular building class is understood to

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<sup>147</sup> T24 lines 10-18.



be a reference to all sub-classifications of that class.<sup>148</sup> Therefore, the reference to a Class 1 building in the deemed-to-satisfy provision includes a Class 1a building, which encompasses both the Dwelling on the Land and the Pool House.

129 The deemed to satisfy provision states that performance requirement P2.7.1 will be satisfied for a swimming pool with a depth of water more than 300mm and *which is associated with a Class 1 building*, if it (i.e., the swimming pool) has safety barriers installed in accordance with the relevant Australian Standards. It is necessary to consider what is meant by the phrase; *a swimming pool which is associated with a Class 1 building*, in order to understand and apply the provision. In doing so, once again we must consider the text, its context and statutory purpose which includes the objective of the performance requirements.<sup>149</sup>

130 In *City Apartments Pty Ltd v Hall & Others*,<sup>150</sup> the Full Court considered the phrase “*in association with*” in the context of excavation or filling of land in association with the construction, conversion or alteration of, or addition to, a building. In that case, the Development Assessment Commission (DAC) (as it then was known) had granted a planning consent for the construction of a dwelling and associated excavation works on land in the Hills Face Zone. An application for judicial review was made to the Supreme Court in relation to the decision. At issue was whether the DAC or the Council was the appropriate planning authority. This depended on whether excavation and filling for a car park area, driveway and associated garage, being independent of and at different levels from that of the excavation and filling for the dwelling, was *in association with* the construction of a building within the meaning of Pt B(a) of the Schedule to cl 3(1) of Sch 10 of the *Development Regulations 1993* (SA) (now repealed). The Full Court said that the phrase “*in association with*”, “*is one of imprecise meaning*” and that it must be interpreted in its proper context.<sup>151</sup> The Full Court found that given the excavation and filling were necessary for the provision of a car park area, driveway and associated garage, and that reasonably convenient vehicle access to any residence is a necessary feature of any residential development, that the cut and fill was considered to be “*in association with*” the construction of the dwelling.<sup>152</sup> There was clearly an association with, a connection to, or a “*close link*”<sup>153</sup> between the carpark, driveway and garage with the dwelling *located on the same land*.

131 Having regard to the text, context and statutory purpose of the provision, we have determined that a swimming pool *in association with* a Class 1 building refers to a swimming pool that is located on land where a Class 1 building is also present.

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<sup>148</sup> NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (4), at [14].

<sup>149</sup> Which are to safeguard young children from drowning or injury in a swimming pool.

<sup>150</sup> *City Apartments Pty Ltd v Hall & Others* [2001] SASC 337.

<sup>151</sup> [2001] SASC 337, [21].

<sup>152</sup> [2001] SASC 337, [25].

<sup>153</sup> [2001] SASC 337, [26].

*Compliance with AS 1926.1-2012 and AS 1926.2-2007*

132 In order for P2.7.1 to be satisfied, it is the swimming pool which must have barriers installed in accordance with AS 1926.1-2012 and AS 1926.2-2007. For the reasons which follow, having regard to the objective of the performance requirements which is to safeguard against young children drowning, the barrier must, by necessity, be erected between the swimming pool (being the hazard in question) and *any* Class 1 building (including a Class 1a building) that is located on the land. Our reasons for this conclusion follow.

*The barrier on the Land*

133 There was no dispute that the barrier on the Land complies with the Australian Standards, *in relation to the Dwelling on the Land*. It was accepted by the parties that a barrier was required to be erected between the Dwelling and the Pool and Spa. It is implicit in that position that the parties accept that the Dwelling is a Class 1 building and that a barrier is required to be in place separating the Pool and Spa from a Class 1 building (the Dwelling). Being a Class 1 building, the Dwelling is a *habitable* building. It is a building which contains habitable rooms. Occupants of a dwelling may enjoy any number of *normal domestic activities* within the habitable rooms of the dwelling, including; eating in a '*dining room*', sleeping in a '*bedroom*', playing and/or listening to music in a '*music room*', watching television in a '*television room*', sewing in a '*sewing room*', studying in a '*study*', watching a movie in a '*home theatre*', and so on.<sup>154</sup>

134 Each of these habitable rooms may be occupied frequently and/or for extended periods of time by the occupants of a dwelling. There are other rooms which may be located within a dwelling that are specifically excluded from the definition of a habitable room in the Building Code, namely a bathroom, laundry, clothes drying room etc., *and other spaces of a specialised nature occupied neither frequently nor for extended periods*.

135 When an occupant of a Class 1 building is undertaking any of the activities listed above within a habitable room, and/or spending extended periods of time therein, what the occupant is *not doing* or *not able to do* to an appropriate and acceptable standard, level or degree, or indeed at all, is to supervise a young child that is within an outdoor swimming pool that is located on the property. That is of course *why* a barrier must be in place on the Land which isolates the Class 1 habitable building, the Dwelling, from the Pool and Spa. Both the 2014 Development and the reconfigured barrier approved in the 2023 Development continued to prohibit access from the Dwelling to the Pool and the Spa.

136 The Pool House is *also* a Class 1 building (in particular, a Class 1a building). It *also* contains *habitable* rooms. The same kinds of 'normal domestic activities' described above can *also* take place within the habitable rooms of the Pool House. These rooms can also be occupied frequently and/or for extended periods of time.

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<sup>154</sup> All of the rooms listed in italics in this paragraph are *habitable rooms* as defined in the Building Code.

Given that is so, there is no logical or rational basis to accept that on the one hand a barrier is required between the Dwelling and the Pool and Spa, but on the other hand, a barrier is not required between the Pool House and the Pool and Spa. The building classification for each building is the same under the NCC. There is no reason why the two buildings should be considered differently in this regard given they are both Class 1 buildings. *Each* of the buildings exist on land where a swimming pool is located. The risk of a young child drowning will exist whenever a young child is located within any Class 1 habitable building when there is no barrier in place, or where a non-compliant barrier is in place between that Class 1 building and the hazard.

137 To illustrate, if one of the two main habitable rooms in the Pool House was being used as a bedroom (and there is no reason why such a room could not exist in the Pool House given its building classification) it is conceivable that the occupant of that bedroom may fall asleep. Notwithstanding the fact that a child may have had to first pass through the existing child resistant barrier on the Land to gain access to the Pool Area, if the young child happens to exit the Pool House through the glass sliding doors, the person asleep in the bedroom is no longer able to supervise the child within the Pool or Spa or within the immediate pool surrounds, because, obviously, they are asleep. Similarly, if one of the two main habitable rooms in the Pool House was being used as a television room or a home theatre (quite possibly with curtains drawn eliminating entirely any visibility of the Pool and the Spa and the immediate pool surrounds) it is also possible that those in occupation may have their attention diverted away from a young child who, unbeknownst to those watching the television or similar, may have left the Pool House through the glass sliding doors, and entered the Pool or the Spa and the immediate pool surrounds.

138 In addition, as observed on the view, which was confirmed by Mr Neaylon when he gave evidence, depending on where an occupant is located within either of the two main habitable rooms within the Pool House, between 15-30% of the Pool and the surrounding pool area are not visible. Appendix B highlights the importance of the whole of the pool area being able to be viewed. It provides that the type of barrier and the location of a pool within a property should permit viewing through or over a barrier so that the pool area may be directly viewed. Although there is no barrier per se between the Pool House and the Pool and the Spa, the clear intention of the provision is that views to a pool and the immediate pool surrounds, within a pool area, must be clear and unobstructed so as to ensure that adequate surveillance can occur.

139 If a young child is in the Pool House, the risk of that child drowning is not reduced in a meaningful way by virtue of the fact that the child has first passed through a child resistant gate in the existing barrier on the Land to gain access to the Pool House. The risk is significantly reduced however if there is a barrier in place restricting access from the Pool House itself to the Pool and the Spa and the immediate pool surrounds. If there is a barrier in place between any habitable

room or habitable building and a swimming pool, the risk of a young child drowning will be significantly reduced. The erection of a barrier between any habitable room or habitable building and a swimming pool, ensures that:

1. a barrier is provided to the swimming pool that is continuous for the *full extent* of the hazard (P2.7.1(a)); and
2. a barrier is provided which restricts access of young children to the pool and the immediate pool surrounds (P2.7.1(c)).

140 Given our findings, all of the arguments in support of Ground 2 advanced by the appellant must be rejected. For completeness, we will briefly deal with each of the arguments in turn.

There is an existing barrier in place around the “pool area” which complies with the Australian Standards

141 A “pool area” is defined in the Standards as “*the area that contains the pool and is enclosed by a safety barrier*”. The preface to AS 1926.1-2012 which the appellant relies on, provides that the objective of that Standard is to assist pool owners/users in avoiding pool-related drowning by the installation of a barrier; “...*designed to restrict entry to the swimming pool area by young children*”.<sup>155</sup> The preface to AS 1926.2-2007 also provides that the objective of that Standard is to ensure that barriers are; “...*designed to deny, delay or detect unsupervised entry to the swimming pool area by young children*”.<sup>156</sup> The appellant contends that there is a barrier in place which restricts or prevents entry to the *swimming “pool area”*, as defined. On that basis she claims that the barrier is compliant.

142 However, that argument can only be sustained if the Court is to accept that it is the appellant, or any pool owner for that matter, who decides *where* a barrier is to be located on the relevant land. If that argument is accepted, the pool area would be whatever area the landowner created by erecting a barrier at a location that he or she selected.

143 We reject that argument. The appellant submits that the Pool House is a free standing building within the Pool Area that is inaccessible other than through the child resistant gate in the safety barrier. She identified the extent of the barrier which included three of the four external walls of the Pool House and the glass barrier containing the safety gate. For the reasons articulated earlier, that is the incorrect approach in assessing whether the requirements relating to the construction and safety of swimming pools *under the Building Code* are satisfied.

144 When the provisions of the Building Code are considered first, it is clear that the barrier must be in place between the swimming pool and *any* Class 1 building on the land. If a barrier is erected between the Pool House and the Pool and Spa *and* the Dwelling and the Pool and Spa, as required under the Building Code, it

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<sup>155</sup> Exhibit R1 at [52].

<sup>156</sup> *Ibid* at [101].

will be the area that contains the Pool and Spa that is enclosed by *that* barrier (which barrier prohibits access from both the Dwelling *and* the Pool House) that will constitute the “*pool area*”. *That* is the area to which access must be denied or restricted when considering the provisions of the Australian Standards. Although the existing barrier on the Land may comply with the Standards in relation to the Class 1 Dwelling, it does not comply with respect to the Class 1a Pool House.

Figure 2.1 in AS 1926.2-2007

145 The appellant argued that none of the four diagrams in Figure 2.1 in AS 1926.2-2007 had application in this case. She said that each of these were ‘*typical examples*’ only of a barrier location for the purposes of clause 4.2 of AS 1926.2-2007. The fact that the existing scenario at the Land was not depicted in one of those four diagrams does not result in the Standards being offended. She said that it was the three criterion in clause 4.2 which must be met with respect to the existing barrier that is in place. Once again, the appellant has approached the assessment in reverse by first applying the text of the Standards to the existing barrier which she herself has placed on the Land. It is true that the existing barrier on the Land, which separates *the Dwelling* from the Pool and the Spa, does meet the three criterion in clause 4.2. However, for the reasons previously identified, that is not the end of the matter. The Building Code requires a barrier to also be in place between the Pool House and the Pool and Spa, and there is no barrier in place.

146 The Council submitted that the southern elevation of the Pool House formed part of the barrier and because it contained a set of glass sliding doors, it did not comply with the provisions of the Standards. This is because since 2011 a child resistant door set is no longer permitted to form part of a barrier to an outdoor pool. We agree that the southern elevation of the Pool House which contains a set of glass sliding doors does not comply with the provisions of the Standards. That being so, the three criterion in clause 4.2 cannot be said to be satisfied.

147 We accept that it does not necessarily follow that if an existing barrier for an outdoor pool is not depicted in any of the four diagrams shown in Figure 2.1, that the barrier will be non-compliant. The barrier approved in the 2014 Development incorporated a dog leg design and that configuration is not depicted in any of the four typical examples shown in Figure 2.1 either. However, the barrier approved in the 2014 Development achieved the same result when considering the diagrams shown in Figure 2.1 because, as approved, there was no access to the Pool and the Spa from the Pool House in the 2014 Development. The diagrams in Figure 2.1 reinforce and support the fact that a barrier must be in place between a Class 1 building (which includes a Class 1a building) and an outdoor pool.

Appendix B in AS 1926.2-2007

148 The appellant argued that although Appendix B does not encourage buildings to be located within a pool area, it does not strictly prohibit it. She submitted that there was nothing in the Standards which prohibits the Pool House being located within the Pool Area. Appendix B provides:

Where possible, tool sheds, garages, barbecues and clotheslines should be located outside the pool area to reduce the likelihood of self-closing gates being propped open in order to gain access.

149 We agree that Appendix B contemplates that there may be situations where certain buildings or structures are located within a pool area, but it clearly discourages it for the reasons provided. It does not follow that any buildings are therefore permitted to be located within a “pool area” (i.e., within the area which contains the pool that is enclosed by a barrier). The buildings referred to in Appendix B are Class 10 non-habitable buildings. A Class 1 habitable building is not referred to at all in the relevant passage relied upon by the appellant. This matter involves a Class 1a building and not a Class 10 building. It is not necessary for the Court to rule on what the position is with respect to Class 10 buildings within a “pool area”. We have already identified however that a small shed housing the infrastructure associated with a swimming pool could quite possibly be located within the *immediate pool surrounds* given it is *directly associated with* the use of the swimming pool, and because it would be accessed infrequently and not for extended periods of time. A non-habitable building would generally not create distractions or become an impediment to the provision of adequate supervision to young children that may be within the pool or the immediate pool surrounds given the frequency and duration of use. Appendix B does not support the submission that a Class 1 building may be located within a “pool area”.

The 2016 version of the Building Code

150 There was a specific provision in the 2016 version of the Building Code which required a compliant barrier to be in place between a habitable room or habitable building located in a “pool area”, and the pool itself. We reject the argument that the insertion and subsequent deletion of this provision means that it is no longer a requirement of the Building Code that a barrier must be in place in that scenario. We agree with the submissions of the Council that such a provision is unnecessary and superfluous given our assessment and consideration of the relevant provisions of the Building Code, and the relevant Australian Standards, which support our finding that a barrier is required to be in place between any Class 1 or Class 1a building and a swimming pool. An additional provision such as that which existed in the 2016 version of the Building Code would serve no purpose because a habitable room or a habitable building are each Class 1a buildings or structures. The provisions of the Building Code already require a barrier to be in place between such buildings and a swimming pool.

### *Conclusion in relation to Ground 2*

151 We find that in order for the *deemed to satisfy* provision to be met (Part 3.10.1.0), that the Pool and the Spa on the Land must have a barrier installed between “it” and *any* Class 1 building that is located on the Land. We find that while there is a safety barrier installed in accordance with AS 1926.1 and 1926.2 between the Dwelling and the Pool and the Spa, there is no compliant safety barrier between the Pool House and the Pool and the Spa as required under the Building Code. Accordingly, the owner has not ensured that the designated safety features have been installed and maintained in accordance with the prescribed requirements, namely, the requirements relating to the construction and safety of swimming pools under the Building Code, as it applied at the time the application for either the 2014 Development or the 2023 Development was made. Her failure to comply with her legislative obligations constitutes a breach of s 156 of the Act.

152 Ground 2 is dismissed.

### *Ground 1*

153 The decision of the Full Court in *Sullivan v District Council of Riverton*,<sup>157</sup> requires that breaches of the legislation should be identified with “*reasonable particularity*”.<sup>158</sup> It is essential that the terms of any enforcement notice are clear and unambiguous as to the nature of the breach and what is required to put it right. A notice which does not achieve this is not a proper notice.

154 The Notice is a reasonably detailed one. It identified the following matters in reasonably clear terms which we have summarised below, namely that:

- (i) the Pool House is a Class 1a building (*paragraph 3*);
- (ii) the barrier approved in the 2014 Development complied with the Building Rules in force at the time, and the Australian Standards *because* there was a barrier between the Pool House and the Pool (*paragraph 4*);
- (iii) following the grant of development approval to the 2023 Development, and following its implementation, an inspection revealed that the sliding doors of the Pool House opened directly to the Pool and the Spa and that a *lack of a barrier* between the Pool House and the Pool and Spa *constituted a breach of the Act* (*paragraph 5*);
- (iv) the Act and the SPS Regulations together set out the statutory scheme with respect to swimming pool safety, and in particular the requirements of r 6(1)(b) of the SPS Regulations were set out in the Notice itself (*paragraphs 14.1, 14.2 and 14.3*);

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<sup>157</sup> (1997) 69 SASR 234.

<sup>158</sup> (1997) 69 SASR 234 at 247.

- (v) a designated owner (which included the appellant) is obliged to comply with those requirements and that a failure to do so constitutes a breach of the Act (*paragraph 14.5*);
- (vi) the appellant had breached the Act because she had failed to install and maintain a swimming pool safety barrier between the Pool House and the Pool and the Spa (*paragraph 14.6*); and
- (vii) the sliding doors within the Pool House did not comply with the *Building Code* because a person could access the Pool and the Spa without being required to pass through a child resistant gate and barrier as required by the relevant Australian Standards.

155 The appellant was critical of the Notice arguing that it contained “*substantial deficiencies*” because it failed to identify which provisions in particular of the Building Code and the Australian Standards were offended in this case. With respect to the Standards, it was argued that there was no distinction made between AS1926.1-2012 and AS1926.2-2007. She argued that she was entitled to know what was alleged against her, that the Notice was defective in this regard and should be set aside on that basis.<sup>159</sup>

156 In reviewing the Notice there can be no doubt that the breach of the Act in this case related to the lack of a barrier between the Pool House and the Pool and the Spa. We do not consider that any additional information would have made the alleged breach of the Act as identified in the Notice any clearer than it already was. The Council’s response to the appeal notice<sup>160</sup> which was filed after the proceedings were commenced did not mean that the Notice was not readily understood in its current form. That document was filed to assist the parties and the Court to understand the nature of the issues to be argued at the hearing, including, the basis for the Council’s collateral challenge to the building consent issued by the private certifier.

157 In the matter of *Amberich Pty Ltd v The City of Mount Gambier*<sup>161</sup> (*Amberich*), which involved an appeal against a s 84 enforcement notice issued under the *Development Act*,<sup>162</sup> the Court held that it was relevant to construe the notice against the history of the use of the land as known to both parties.<sup>163</sup> His Honour Judge Costello said:

This is not a case of an appellant receiving, for the first time without warning, a notice from the Council. In this case almost the complete opposite is true, namely an appellant using the land for the storage of salvage materials without approval, then lodging a development application, the Council refusing that application and this Court upholding that refusal.

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<sup>159</sup> Appellant, Written submissions of appellant, 16 August 2024, [97].

<sup>160</sup> Respondent, Amended response to originating appeal notice by respondent, (undated).

<sup>161</sup> [2013] SAERDC 12.

<sup>162</sup> The equivalent provision of the repealed *Development Act* to a s 213 enforcement notice issued under the *PDI Act*.

<sup>163</sup> [2013] SAERDC 12, [11].



I do not consider that, in such circumstances, the appellant can be heard to complain about an alleged lack of precision in the description of the breach or and the required remedy in quite the same way as a person receiving a Notice “out of the blue” as it were.<sup>164</sup>

158 As was the case in *Amberich*, the Notice in this case did not just come “out of the blue”. Prior to the issue of the Notice in April 2024, the Council had issued an enforcement notice on 7 November 2023 following Mr Neaylon’s inspection the previous month. That earlier notice had been withdrawn by the Council on a without prejudice basis to enable the Council to engage with the appellant’s legal representatives in relation to the matter.<sup>165</sup> There were numerous communications between the parties prior to the issue of the Notice which are set out in Mr Neaylon’s Affidavit. Mr Neaylon also gave evidence about that.<sup>166</sup> This included correspondence between Mr Riches and Mr Neaylon in addition to the appellant’s legal representatives and the Council’s legal representatives.<sup>167</sup>

159 In that context, the recipient of the Notice would have been clear as to what the Notice was directing her to do particularly in light of the communications between the parties leading up to the issue of the Notice between November 2023 and April 2024. As submitted by the Council, the issue was straight forward and had been expansively agitated in the prior correspondence which was itself referred to in the Notice.<sup>168</sup> We have determined that the Notice did indicate in reasonably clear terms the nature of the breach and that it was clear and unambiguous in its terms.<sup>169</sup>

160 The Notice also indicates in reasonably clear terms what is required in order to rectify the breach. The Notice directs that the appellant is required to install a compliant safety barrier between the Pool House and the Pool and Spa, which barrier must comply with the relevant Australian Standards, within two months. The Council was not required to direct precisely how or where such a barrier was required to be placed on the Land. The only requirement, when considering the Notice in context, is that a barrier must be in place between the Pool House and the Pool and Spa. The appellant could elect to reinstate the 2014 barrier, or she could choose to install a barrier without a dog leg design which would run in a straight east west direction. There may have been other options available to the appellant but it would be a matter for the appellant to ensure that, whatever barrier was proposed, it would need to comply with the Australian Standards. It was correct to indicate that both parts of the relevant Standards were required to be complied with. Part 1 of the Standards (AS1926.1-2012) deals with the technical requirements of any barrier whereas Part 2 of the Standards (AS1926.2-2007) is concerned with the locational requirements of any barrier. Both parts are relevant

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<sup>164</sup> Ibid, [11]-[12].

<sup>165</sup> See paragraph 10 of the Notice.

<sup>166</sup> T26.

<sup>167</sup> Exhibit R7 at [17] – [64].

<sup>168</sup> Respondent, Respondent’s outline of submissions, 16 August 2024, [63].

<sup>169</sup> *Sullivan v District Council of Riverton* (1997) 69 SASR 234, at [249].

in this case. Indeed, *all* parts of *both* parts are relevant with respect to the placement of any barrier on the Land. The only way the Notice could have been made any clearer as to what the Council's requirements were would have been to annex the entirety of both parts of the Australian Standards. We don't consider that this was necessary. The relevant standards were referenced in the Notice and it was a matter for the recipient of the Notice to determine how the barrier was going to meet the provisions of the Standards, while noting that the barrier must be erected between the Pool House and the Pool and Spa.

161 Ground 1 is dismissed.

#### **Ground 4**

##### *The issue of a development approval by the Council to the 2023 Development*

162 The appellant submits that in issuing the development approval to the 2023 Development, which approval depicted the reconfigured barrier permitting access to the Pool and the Spa through the glass sliding doors of the Pool House, the Council cannot now allege that the building consent does not comply with the Building Rules. She contends that the approval was issued on the basis that the proposed development complied with the Building Code,<sup>170</sup> and that absent a judicial determination as to invalidity, the Council must accept that the consent does comply with the Building Rules. It was otherwise submitted that the Court should quash the Notice based on the Council's failure to take issue with the barrier at the time of the grant of the development approval which the appellant has relied on to her detriment (if the Notice stands).

163 Ground 4 raises three issues:

1. is a decision-maker under the Act able to revisit an earlier administrative decision which he or she considers to be made without jurisdiction?
2. did the Council make an earlier decision that the 2023 Development, including the existing barrier, complied with the Building Rules and now seeks to revisit that decision?
3. in any event, are the requirements imposed by s 156 of the Act and the SPS Regulations subject to or avoided by a development authorisation?

##### Revisiting an earlier administrative decision

164 The appellant placed reliance on the decision of McWilliam AsJ in *Capital Recycling Solutions Pty Ltd v Planning and Land Authority of the ACT*<sup>171</sup> in which it was held that there was a line of authority to the effect that invalidity is required to be established by a judicial rather than an administrative determination and any decision tainted by jurisdictional error is valid and effective in law until such a

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<sup>170</sup> Appellant, Written submissions of the appellant, 16 August 2024, [98].

<sup>171</sup> [2019] ACTSC 58.

determination is made.<sup>172</sup> It was further held that had particular application in the planning context where the system would be unworkable if a decision could be administratively revisited.<sup>173</sup>

165 That statement of principle appears inconsistent with the observation made by Gaudron and Gummow JJ in *Minister for Immigration & Multicultural Affairs v Bhardwaj (Bhardwaj)*:<sup>174</sup>

There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.

166 In *Jadwan Pty Ltd v Secretary, Department of Health & Aged Care*,<sup>175</sup> the Full Federal Court explained the apparent conflict between those decisions and held that *Bhardwaj* is not authority for the universal proposition that jurisdictional error leads to the decision having no consequences whatsoever but instead supports the proposition that the legal and factual consequence of the decision will depend upon the particular statute.

167 We consider that the language of the Act, the subject matter of the legislation and the consequences to the parties all support the proposition that the Council is not able to revisit a development approval that it has granted even if it takes the view that its initial decision was subject to jurisdictional error. As to the first matter, the Act sets out how a decision can be challenged. It provides for circumstances in which the applicant may seek to vary or cancel a development authorisation. It does not permit the Council to seek to vary or discharge its approval. As to the second and third matters, the planning system would be unworkable if a decision can be later revisited. The parties can be expected to place reliance and spend money on the basis of an approval.

Has the Council made a decision that the 2023 Development including the existing barrier complied with the Building Rules

168 Section 99 of the Act provides:

(1) If—

(a) a proposed development involves the performance of building work; and

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<sup>172</sup> Ibid at [20].

<sup>173</sup> Ibid at [22].

<sup>174</sup> (2002) 209 CLR 597 at [54]; [2002] HCA 11.

<sup>175</sup> [2003] FCACF 288 at [42], See also *Martinovic v Workers Compensation Commission of New South Wales* [2019] NSWSC 1532 at [103]-[109]; *Jackson v Purton* [2011] TASSC 28 at [54].

- (b) a relevant authority determines to act under this subsection, the relevant authority may—
  - (c) refer the assessment of the development in respect of the Building Rules to the council for the area in which the proposed development is to be undertaken; or
  - (d) require that the assessment of the development in respect of the Building Rules be undertaken by a building certifier.
- (2) If subsection (1) applies—
- (a) in the case of subsection (1)(c)—the council for the area in which the development is to be undertaken will be the relevant authority for the purposes of—
    - (i) assessing the development against and, if appropriate, granting a consent in respect of, the relevant provisions of the Building Rules; and
    - (ii) if appropriate, granting development approval; and
  - (b) in the case of subsection (1)(d)—
    - (i) the building certifier will be the relevant authority for the purposes of assessing the development against and, if appropriate, granting a consent in respect of, the relevant provisions of the Building Rules; and
    - (ii) the council for the area in which the development is to be undertaken will be the relevant authority for the purposes of, if appropriate, granting development approval.
- (Our underlining).

169 In accordance with the statutory scheme set out above, a building consent may be granted to a development by a relevant authority, being either a council or a building certifier<sup>176</sup> (also known as a private certifier which was the terminology used under the *Development Act 1993* (SA) (now repealed)). A building consent may be granted once a relevant authority has assessed a development against and granted a consent in respect of the relevant provisions of the Building Rules.<sup>177</sup> In this case, the appellant engaged a building certifier, PBS, to assess the 2023 Development against the Building Rules and for the purpose of granting a building consent to that development.<sup>178</sup>

170 Section 118 of the Act sets out the statutory framework with respect to the grant of a building consent as follows:

- (1) If the regulations provide that a form of building work complies with the Building Rules, any such building work must be granted a building consent (subject to such conditions or exceptions as may be prescribed by the regulations).

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<sup>176</sup> *Planning, Development & Infrastructure Act 2016* (SA), s 92.

<sup>177</sup> *Planning, Development & Infrastructure Act 2016* (SA), s 102(1)(b).

<sup>178</sup> The Building Rules is defined in s 3 of the Act to include the Building Code, as it applies under the Act.

- (2) Subject to [subsection \(6\)](#), a development that is at variance with the Building Rules must not be granted a building consent unless—
  - (a) the variance is with the performance requirements of the Building Code or a Ministerial building standard and the Commission concurs in the granting of the consent; or
  - (b) the variance is with a part of the Building Rules other than the Building Code or a Ministerial building standard and the relevant authority determines that it is appropriate to grant the consent despite the variance on the basis that it is satisfied—
    - (i) that—
      - (A) the provisions of the Building Rules are inappropriate to the particular building or building work, or the proposed building work fails to conform with the Building Rules only in minor respects; and
      - (B) the variance is justifiable having regard to the objects of the Planning and Design Code or the performance requirements of the Building Code or a Ministerial building standard (as the case may be) and would achieve the objects of this Act as effectively, or more effectively, than if the variance were not to be allowed; or
    - (ii) in a case where the consent is being sought after the development has occurred—that the variance is justifiable in the circumstances of the particular case.
- (3) No appeal lies against—
  - (a) a refusal of concurrence by the Commission under [subsection \(2\)\(a\)](#); or
  - (b) a refusal of building consent by a relevant authority if the Commission has refused its concurrence under [subsection \(2\)\(a\)](#); or
  - (c) a condition attached to a consent or approval that is expressed to apply by virtue of a variance with the performance requirements of the Building Code or a Ministerial building standard.
- (4) A relevant authority may, at the request or with the agreement of the applicant, refer proposed building work to the Commission for an opinion on whether or not it complies with the performance requirements of the Building Code or a Ministerial building standard.
- (5) In addition, regulations made for purposes of this subsection may provide that building work of a prescribed class must not be granted a building consent unless the Commission concurs in the granting of the consent.
- (6) If an inconsistency exists between the Building Rules and the Planning Rules in relation to a State heritage place or a local heritage place—

- (a) the Planning Rules prevail and the Building Rules do not apply to the extent of the inconsistency; but
- (b) the relevant authority must, in determining an application for building rules consent, ensure, so far as is reasonably practicable, that standards of building soundness, occupant safety and amenity are achieved in respect of the development that are as good as can reasonably be achieved in the circumstances.
- (7) A relevant authority must seek and consider the advice of the Commission before imposing or agreeing to a requirement under [subsection \(6\)](#) that would be at variance with the performance requirements of the Building Code or a Ministerial building standard.
- (8) **Subject to this Act, a relevant authority must accept that proposed building work complies with the Building Rules to the extent that—**
  - (a) such compliance is certified by the provision of technical details, particulars, plans, drawings or specifications prepared and certified in accordance with the regulations; or
  - (b) such compliance is certified by a building certifier.
- (9) No act or omission by a relevant authority in good faith in connection with the operation of [subsections \(6\)](#) or [\(8\)\(a\)](#) (other than where a certificate under [subsection \(8\)\(a\)](#) is given by a building certifier) subjects the relevant authority to any liability.
- (10) The relevant authority may refuse to grant a consent in relation to any development if, as a result of that development, the type or standard of construction of a building of a particular classification would cease to conform with the requirements of the Building Rules for a building of that classification.
- (11) If a relevant authority decides to grant building consent in relation to a development that is at variance with the Building Rules, the relevant authority must, subject to the regulations, in giving notice of its decision on the application for that consent, specify (in the notice or in an accompanying document)—
  - (a) the variance; and
  - (b) the grounds on which the decision is being made.

(Our underlining and emphasis).

171 Section 36 of the repealed act was in almost identical terms to s 118 of the Act set out above. In the matter of *Liu & Anor v City of Playford (Liu)*,<sup>179</sup> the appellants appealed against a decision of the City of Playford to refuse to grant a development approval in circumstances where they had obtained a Building Rules consent (the equivalent of a building consent under the Act) from a private certifier. In that case the council withheld development approval on the basis that

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<sup>179</sup> [2014] SAERDC 31.

they considered the Development Plan consent (the equivalent of a planning consent under the Act) was inconsistent with the Building Rules consent that had been granted because the class assigned to the proposed development by the certifier was incorrect.

172 His Honour Judge Costello considered the terms of s 36 of the repealed act and determined that it was “*tolerably clear from a reading of those provisions that...a Council must accept that an assessment (that the building work complies with the Building Rules) is correct if the assessment is so certified by a private certifier*”.<sup>180</sup>

173 His Honour then went on to consider r 46 of the *Development Regulations 2008* (now repealed) which is in similar terms to r 53(5) and (6) of the General Regulations. These provisions set out the prerequisites that must be satisfied before a development approval can be granted under the Act. Regulations 53(5) and (6) of the General Regulations provides:

- (5) Despite a preceding subregulation, where a council is acting as the relevant authority for the purpose of granting the final development approval under the Act and the council has received notice, via a scheme applying under the SA planning portal, that all relevant consents have been granted under Part 7 of the Act (and that none of those consents have lapsed), the council must, within 5 business days—
  - (a) if the consents are consistent—grant the final development approval; or
  - (b) if 2 or more consents are inconsistent—take reasonable steps to inform the applicant of the inconsistency.
- (6) If or when the council is satisfied that the consents are consistent with each other after taking steps under subregulation (5)(b), the council must grant the final development approval within 5 business days.

174 With respect to the equivalent provision to r 53 (5) and (6) of the General Regulation under the repealed regulations (regulation 46), in *Liu* His Honour said:

It is readily apparent, at the outset, that reg 46 is concerned to ensure that all consents necessary under Part 4 Division 1 of the Act have been obtained. These are the consents identified in s 33 of the Act which provide that a development is approved only if ‘*a relevant authority has assessed a development against and granted consents with respect to*’ various matters which, for these purposes, are confined to assessments against the Development Plan and the Building Rules.

If the Council is satisfied that the relevant consents have been obtained, reg 46 then obliges the Council to determine whether the consents are ‘consistent with each other’.

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<sup>180</sup> [2014] SAERDC 31, [6].

Importantly there is no suggestion in reg 46 that the Council need concern itself with the provisions of Part 6 of the Act with respect to the Classification of a building.

...

In such circumstances, there is no warrant to import into the wording of reg 46 a power for a Council to embark upon a fresh consideration of a building's classification. The only role for the Council at this stage is to examine the consents issued under Part 4. If these consents are consistent the Council must issue the approval. (emphasis in original).

175 When considering the scheme of the Act and General Regulations, it is evident that upon the receipt of a building consent granted by a building certifier, the Council is obliged to accept that the relevant consent complies with the Building Rules. Further, in determining whether to grant a development approval to a development, the Council's role is limited to a consideration of those matters identified in r 53(5) of the General Regulations, namely (i) whether all necessary consents have been obtained, (ii) whether any of the consents have lapsed and (iii) whether the consents are consistent. Provided all of those matters are satisfied, the Council *must* then issue a development approval. As was the case in *Liu*, there is also no suggestion in r 53(5) that the Council need concern itself with any other matters.

176 Section 118(8)(b) of the Act specifically directs the Council to not review the merits of the building consent that may be issued by a building certifier. What follows from this is that the appellant's argument that the Council issued the development approval to the 2023 Development *on the basis that* the proposed development complied with the Building Code must be rejected. The Council did not issue the development approval on that basis at all. The Council issued the development approval *on the basis that* all of the limited matters which it was required to consider in r 53(5) were met. Mr Neaylon gave evidence about what occurred in this case, which was consistent with what the Act and associated regulations contemplate.<sup>181</sup> The Council did not, nor was it required to, consider whether the 2023 Development complied with the Building Rules. It was *obliged* to accept the certifier's decision and it was *required* to issue the development approval in the circumstances.

177 For the same reasons we also reject the appellant's criticism of the Council for failing to alert her to the fact that the building consent didn't comply with the provisions of the Building Code at the time the development approval was granted. There is no evidence that the Council was aware of that fact at the time that development approval was granted. It is quite likely that the Council may have only first become aware that the building consent didn't comply with the provisions of the Building Code when Mr Neaylon undertook his inspection of the Land in October 2023, which was after the reconfigured barrier had already been erected on the Land. However, on the evidence before the Court, no finding can

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<sup>181</sup> T10 lines 28-38.



be made as to when the Council became aware that the building consent did not comply with the provisions of the Building Code.

Are the requirements imposed by s 156 of the Act and the SPS Regulations avoided by a development authorisation

178 The Council argues that the requirements as to swimming pool safety, which are set out in s 156 of the Act and the SPS Regulations are not subject to or avoided by a development authorisation that has been granted under the Act. We agree. Section 156 of the Act provides that an owner must comply with the prescribed requirements which are set out in the SPS Regulations. Regulation 6(1)(b) provides what those requirements are, which in this case, are the requirements relating to the construction and safety of swimming pools under the Building Code at the relevant time. There is no mention of a development approval or a development authorisation in r 6(1)(b) or in s 156 of the Act. The Council submits that r 6(1)(b) was drafted in this way deliberately in recognition of the priority for public safety.<sup>182</sup> Indeed, the present case is a good example of why it is that s 156 of the Act *should* sit outside the development approval process. The Council should not be bound to accept the subjective opinion of a building certifier that the requirements relating to the construction and safety of swimming pools under the Building Code have been satisfied. A council is a designated authority charged with the duty and responsibility to ensure that the legislation with respect to swimming pool safety is complied with. It is appropriate that it can undertake its own assessment of whether the designated safety features with respect to a swimming pool have been installed and are being maintained on land within its area pursuant to s 156 of the Act. We accept that section 118(8) of the Act requires a relevant authority to accept that proposed building work complies with the Building Rules to the extent that it is certified by a building certifier. However, that subsection is *subject to* the Act. The clear intention of s 156 of the Act and the SPS Regulations is that the Council is *not required to accept* such certification with respect to swimming pool safety because r 6(1)(b) of the SPS Regulations requires an objective assessment to be made against the provisions of the Building Code and not a consideration or review of a building certifier's decision. For all of these reasons, *Capital Recycling Solutions* can be distinguished on that basis.

179 Ground 4 is dismissed.

**Collateral challenge**

180 Given our findings in relation to the manner in which s 156 of the Act operates outside the development approval process under the Act, it is not strictly necessary for the Court to consider whether it is permissible in these proceedings for the Council to mount a collateral challenge to the certifier's decision. This is because the certifier's decision is not relevant to the question of whether the owner is in breach of s 156 of the Act. However, for arguments sake, if it was necessary

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<sup>182</sup> T78 lines 19-26.

for the Court to consider whether such a challenge is permissible in these proceedings, we have determined that in the circumstances of this particular case, it ought not be permitted. A collateral challenge was described by McHugh J in *Ousley v The Queen*<sup>183</sup> as follows:

A collateral attack on an act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. In *In re Preston*, however, Lord Scarman used the term "collateral challenge" to include any process challenging a decision - including an application for judicial review - other than a proceeding by way of appeal. This use of the term is readily intelligible. However, with the widespread availability of judicial review procedures, it conduces to clarity of thought, in my opinion, if the term "collateral challenge" is confined to challenges that occur in proceedings where the validity of the administrative act is merely an incident in determining other issues.<sup>184</sup>

181 The Council submitted that in the ordinary course, administrative decisions are open to collateral challenge by the Court when the Court is dealing with an issue properly arising as an element in a justiciable controversy of which the Court is seized.<sup>185</sup> In *Jacobs*,<sup>186</sup> Besanko J reviewed the authorities on collateral challenge and held that there may be good reasons to allow a collateral challenge subject to the relevant factors set out at [93]:

I do not think there is any doubt that in some cases there are good reasons to allow a collateral challenge and in other cases there are good reasons to deny it. On occasions there may be cases in which a statutory provision will provide a clear answer to the question whether a collateral challenge is permitted in a particular case. Other possible factors which might be relevant in deciding that question have been discussed in the authorities and in the academic literature...The factors identified include the following:

1. Are the grounds of challenge likely to involve the adducing of substantial evidence?
2. If a collateral challenge is permitted, will all proper parties be heard before the court or tribunal in which the collateral challenge is to be heard?;
3. In the particular case, does the allowing of a collateral challenge by-pass the protective mechanisms associated with judicial review proceedings such as the rules as to standing, delay and other discretionary considerations?;
4. Is there a statutory provision that bears in one way or another on the question of whether a collateral challenge should be permitted?;
5. Is the issue raised by the collateral challenge clearly answered by authority?;
6. Are there other cases pending which raise the same issue?;

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<sup>183</sup> (1997) 192 CLR 69.

<sup>184</sup> (1997) 192 CLR 69, at [98]-[99].

<sup>185</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [36]; *Cairo v The Corporation of the City of Norwood Payneham & St Peters & Anor* [2018] SAERDC 11 per Costello J at [16].

<sup>186</sup> [2006] SASC 32.

7. (Possibly) is there a more appropriate forum in terms of expertise and perhaps court procedures such that a collateral challenge should not be permitted?

(Our underlining).

182 The Council also relied on a decision of this Court in *Cairo* to support its argument that the Court can entertain a collateral challenge of the certifier's decision in these proceedings. In *Cairo*, the appellant had appealed against a decision of the council to refuse to grant development approval to a proposal asserted by the appellant to be for a complying kind of development, under the repealed act. The appellant submitted that the council was obliged to accept the decisions of the private certifier purporting to grant a Development Plan consent and Building Rules consent respectively. The council asserted that the decisions were a nullity. The Court was asked to determine whether the council's challenge to the decisions constituted an impermissible collateral challenge. In that case, the Court determined that it had the power to entertain the collateral challenge. Clearly in that case, the validity of the purported consents was a critical issue in the determination of the proceedings. In addition, and importantly, the certifier was a party to the proceedings.

183 In this case the certifier was not a party to the proceedings. He was not given an opportunity to make submissions to the Court or to defend his decision. That being so, had the Court entertained the collateral challenge, all of the proper parties would not have been heard before the Court. We consider that this is an important and distinguishing feature when considering the authorities on this issue. Had the private certifier, Mr Riches, been joined as a party to the proceedings, we may have reached a different conclusion.

### **The decision in *Thorpe v City of Unley***

184 In 2006, a full bench of this Court comprising a judge and a building commissioner handed down their decision in *Thorpe v City of Unley*.<sup>187</sup> That case involved an appeal against a decision by the council to withhold development approval to a development comprising a rumpus room or pool entertainment room that was located inside the fenced surrounds of an existing swimming pool at the applicant's residential premises. The council alleged that the building rules consent which it had received from a private certifier was inconsistent with a condition of the planning consent which had been granted. The condition in question required the applicant for consent to ensure that the swimming pool safety fencing complied with the relevant Australian Standards in force at that time.<sup>188</sup> Those standards have since been superseded.

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<sup>187</sup> [2006] SAERDC 81.

<sup>188</sup> *Australian Standard AS 1926.1–1993 Fencing for Swimming Pools and AS 1926.2–1995 Swimming Pools Safety – Location of Fencing for Private Swimming Pools.*

185 The Court was asked to determine a preliminary point in that matter, namely, whether the external doors of the proposed room, as certified, met the requirements of the relevant planning condition. In that case, the room was located within the pool surrounds which contained a swimming pool. The rear or southern and the eastern walls of the room constituted part of the required barrier to the pool, as they did not contain any openings. The room could be closed off from the pool with glass bifold doors. In that case, any person wishing to access the room could only do so by passing through the child resistant gate installed as part of the secure fencing around the pool and its surrounds. There was no barrier in place between the rumpus room and the pool. The Court ultimately found that there was no inconsistency with the condition of the planning consent and the building consent. That was because the Court determined that the condition was in fact being complied with (the development had already been constructed).

186 The Court reiterated that the decision in *Thorpe* was relevant only to the facts of that case and that each matter is to be determined on its own facts and applicable law.<sup>189</sup> Since *Thorpe*, the legislation with respect to swimming pool safety which applied at the time *Thorpe* was handed down, has been repealed. There is now a different legislative scheme in force under the Act and the SPS Regulations. The Building Code together with the relevant Australian Standards have all been amended. Counsel for the respondent took the Court through the changes that have been made to the standards since 2006 in some detail.<sup>190</sup>

187 In *Thorpe*, the Court was not being asked to determine whether the relevant swimming pool safety features in place on the land complied with the provisions of the Building Code. In this case, that is precisely what the Court is required to do. This has involved the Court considering the provisions of the Building Code in detail together with the provisions of the Australian Standards. There was no detailed consideration of these matters in *Thorpe*.

188 Given these differences, the decision in *Thorpe* can be distinguished on its facts and this Court is not bound to follow it. Counsel for the appellant agreed<sup>191</sup> and it is clear from the Council's communications with the appellant's legal representative that it also does not consider *Thorpe* to have any application to the facts of this case or the resolution of this appeal.<sup>192</sup>

## Conclusion

189 We have determined that the appellant has breached s 156 of the Act, that the Notice was clear and unambiguous in its terms and was a valid notice. The appeal is dismissed. We will hear the parties in relation to the revocation of the orders made on 27 May 2024 in addition to the question of costs.

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<sup>189</sup> [2006] SAERDC 81, [27].

<sup>190</sup> T46-53.

<sup>191</sup> T102 lines 29-38; T103 lines 1-24.

<sup>192</sup> Exhibit R7, [20], and, at [49-[50].

ANY WINDOW AND DOOR OPENINGS (IF APPLICABLE) ARE RESTRICTED TO 100MM OR INSTALLED WITH APPROPRIATE BARRIER IN ACCORD WITH AS 1926.1

POOL FENCE/SAFETY BARRIER IS MIN. 1200MM IN HEIGHT BUILT IN ACCORD WITH AS 1926.1

— - Pool barrier line

Pump Station enclosed and over 5m from nearest dwelling.

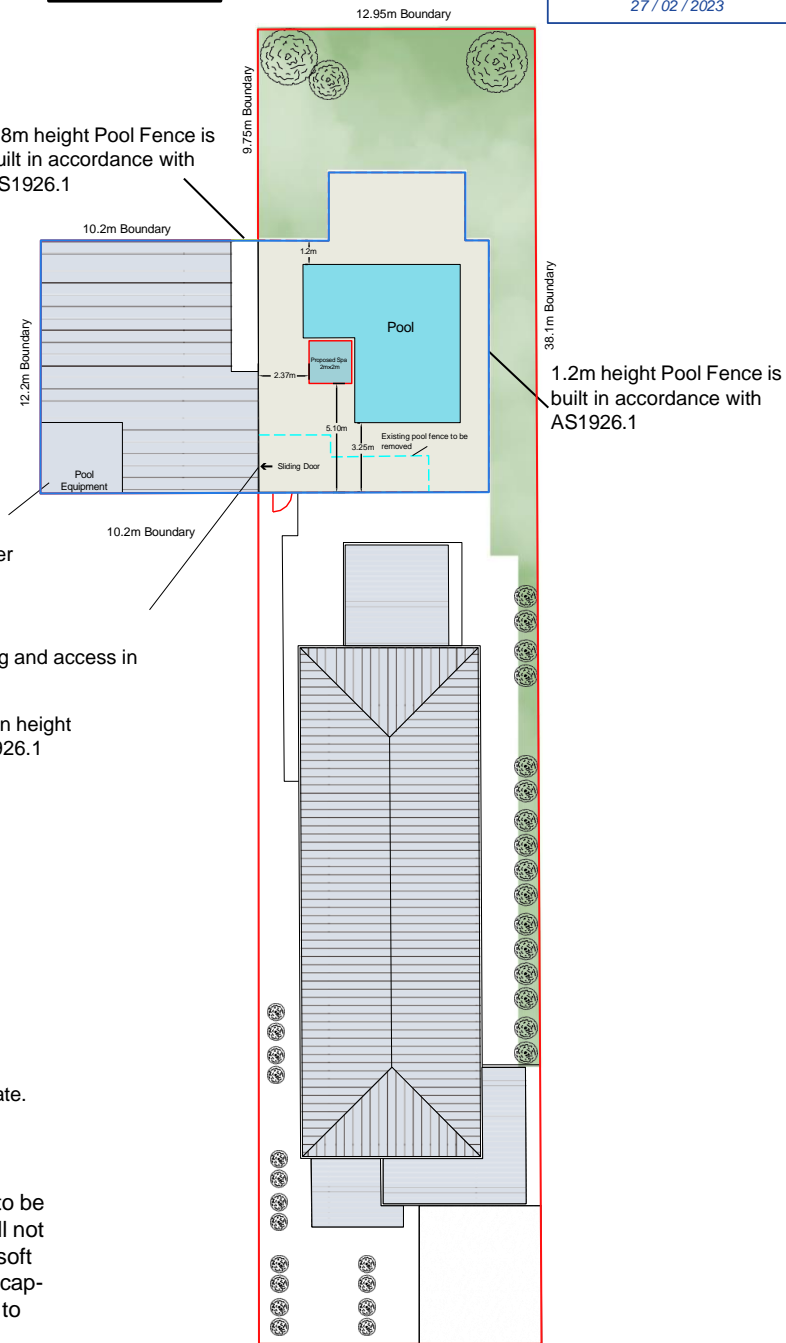
The sliding door is the only opening and access in the entertainment room.

Boundary barrier is min. 1800mm in height and built in accordance with AS 1926.1

A CPR sign must be either attached to the safety fence of the swim pool, or displayed near the swim pool.

\*All measurements are approximate. Builder to confirm measurements on site.

The proposed development is to be built over concrete area and will not reduce the existing amount of soft landscaping on site. Soft landscaping percentage roughly equals to 17%.



30 Partridge Street, Glenelg



(m) 1 2 3 4 5 Scale 1:200

**Item No:** 15.2

**Subject:** **KAURI SPORTING AND COMMUNITY COMPLEX – LEASE TO CARLY BALL (NEW BODY LOADING PERSONAL TRAINING)**

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## Summary

Carly Ball (Carly) has been operating New Body Loading Personal Training out of the western-most changeroom at Kauri Sporting and Community Complex since 2022. Following the exit of Belgravia from the site, she was left without an agreement and wishes to negotiate terms direct with the City of Holdfast Bay (the Council). This report seeks the Council's endorsement for a new lease to be issued to Carly to occupy the premises for a further one-year period.

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## Recommendation

**That:**

- 1. Council enters into a Lease with Carly Ball of New Body Loading Personal Training over portion of land comprised in Certificate of Title Volume 6184 Folio 142 until 31 January 2026 in accordance with the terms and conditions in the document provided as Attachment 1 to this report; and**
  - 2. the Mayor and Chief Executive Officer be authorised to execute and seal any documents required to give effect to this lease.**
- 

## Background

At the time of construction, only two of the four changerooms were completed at Kauri Community and Sporting Complex. Due to budget constraints, the remaining two were left unfinished and designated as storage space. In March 2022, Belgravia entered into a one-year hire agreement with Carly, who ran fitness classes for women out of the western-most unfinished changeroom. Upon Belgravia exiting the site, Carly was left without a formal agreement.

## Report

New Body Loading Personal Training is a private personal training studio focused on strength, muscle growth and overall well-being. It caters to individuals of all ages, genders, and fitness levels. This includes adaptive fitness services through the NDIS, ensuring accessible training for people with disabilities. This inclusive offering sees users visit the site twice a week during the day, at an otherwise dormant period, in addition to some evenings and Saturdays. Carly has fitted out the inside of her tenancy at her own expense, with the exception of the stud wall separating the adjoining unfinished changeroom, which was installed by Belgravia.

Council Administration has negotiated the terms of a new lease with Carly based on the *Sporting and Community Club Leasing Policy* (the Policy). It is noted that the Policy specifically

refers to Kauri Community and Sport Centre as being excluded. This has been disregarded as it is believed the exclusion only applied while the site was under the operational management of Belgravia. The rent amount for the premises is derived by referencing the Policy and applying the 2.5% market rental rate and community benefit discount of 40% value of the main building for the property. Being a Sole Trader, Carly is not entitled to any further discounts. The calculation is provided as Attachment 1 to this report.

*Refer Attachment 1*

The basic terms negotiated with Carly consist of a one-year term from 1 February 2025 at a commencing annual rent of \$5,175 (plus GST), with no right of renewal. The proposed Lease provides certainty for Carly in the short term, additional revenue to contribute to council's operational expenses for the site, while allowing Council the flexibility to consider alternate uses in the future. The draft lease, as executed by Carly, is provided as Attachment 2 to this report.

*Refer Attachment 2*

## **Budget**

Revenue from the New Body Loading Personal Training lease is not reflected in council's Annual Business Plan for 2024-25, and is therefore deemed to be supplementary.

## **Life Cycle Costs**

There are no life cycle costs associated with endorsing the lease. The terms have been negotiated to have minimal financial impact. That being, the maintenance obligations of Council largely fall within the scope already being provided sitewide. Anything within the tenancy itself is generally deemed to be the responsibility of the tenant.

## **Strategic Plan**

Vision - creating a welcoming and healthy place for everyone.

## **Council Policy**

Sporting and Community Leasing Policy

## **Statutory Provisions**

*Local Government Act 1999*

*Retail and Commercial Lease Act 1995*

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**Written By:** Property Manager

**General Manager:** Assets and Delivery, Mr B Blyth

# Attachment 1



**Lease - Rental Calculator - Rent payable by New Body Loading PT**

Premises Value	\$ 7,500,000	159
Area used	4.6%	NOTE: Building Area used by lessee <100%
	\$ 345,000	

Equity \$ - NOTE: \$ Lessee Contributed to the build/premises, if no contribution, then \$0.

Current Rental \$ - NOTE: Add current rent exc GST to determine incremental increases.

To be applied only when Council maintains a area of land (ie playing surface) to a level that is above "Reserve" status. Examples: Cricket Pitch, Football Ovals, Rugby Pit etc.

BUILDING  
LAND

Property Value	Property value minus Equity	Market Rent 2.50%	Net Rent (CoHB Discount) 40%	Non-Exclusive Use (<50%)	OR	Lease incentive discounts (community)					Total discount	New Rent Per Annum	PLUS	Land Size (m2)	Land Charge \$ 0.30
						hire for Public Access (for exclusive use only)(<10%)	Inclusion (<20%)	Governance (<20%)	Youth Programs (<10%)	Multi-Code (<10%)					
\$ 345,000	\$ 345,000	\$ 8,625	\$ 5,175			0%	0%	0%	0%	0%	\$ 5,175				
\$ -		\$ -									\$ -		0	\$ -	\$ -
											\$ 5,175				

The tenant is responsible for providing ongoing evidence of their compliance with the incentive discounts

# Attachment 2

**CITY OF HOLDFAST BAY**

(Landlord)

and

**CARLY EMMA BALL**

(Tenant)

## **LEASE**

PORTION OF LIPSON AVENUE SEACLIFF SA 5049



# LEASE

## PARTIES

**BEWTEEN** CITY OF HOLDFAST BAY ABN 62 551 270 492 of PO Box 19 Brighton SA 5048 (**Landlord**)

**AND** CARLY EMMA BALL as described in ITEM 1 OF SCHEDULE 1 (**Tenant**)

## BACKGROUND

- A. The Landlord is registered as the proprietor, or has the care, control and management, of the Land.
- B. The Tenant has requested a lease of the Premises for the Permitted Use.
- C. The Landlord has agreed and resolved to grant the Tenant a lease of the Premises on the terms and conditions of this Lease.
- D. Where required, the Landlord has undertaken public consultation and/or been granted Parliamentary approval in accordance with the *Local Government Act 1999* (SA).
- E. The parties wish to record the terms of their agreement as set out in this Lease.

## AGREED TERMS

### 1. INTERPRETATION AND DEFINITIONS

The following definitions and rules of interpretation apply unless the contrary intention appears

1.1 **Accounting Period** means respectively:

- (a) the period from the Commencement Date to the next 30<sup>th</sup> June;
- (b) each successive period of twelve (12) months commencing on the 1<sup>st</sup> July and expiring on the next 30<sup>th</sup> June during the Term;
- (c) the period from the 1<sup>st</sup> July in the last year of the Term to the date of expiration or termination of this Lease.

1.2 **Building** means the buildings erected on the Land and includes the Landlord's Property.

1.3 **Commencement Date** means the date specified in Item 5 of Schedule 1.

1.4 **Common Areas** means those portions of the Land designated by the Landlord for common use by the occupiers of the Land and their employees invitees and licensees (if any).

1.5 **CPI Rent Review** is a review of the then current annual rent of the Premises to an amount calculated by changing the rent payable by the Tenant during the year immediately preceding the review date (disregarding any rent free period or other incentive) by a percentage figure equal to the amount (expressed as a percentage) by which the Consumer Price Index (Adelaide - All Groups) has changed during the one year period immediately preceding the relevant review date provided that if during the term the Consumer Price Index ceases to be published or substantially changes, the Landlord will select another similar index or indicator of changes in consumer costs in lieu of the Consumer Price Index for the purposes of this definition.

1.6 **Default Rate** means a rate of two per centum (2%) per annum greater than the published annual rate of interest charged from time to time by Westpac Banking Corporation on overdraft facilities of more than \$100,000.00 and if there is more than one rate published the higher of those rates.

1.7 **GST** has the meaning given to it under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any similar or ancillary legislation.

- 1.8 **Land** means the land described in Item 3 of Schedule 1.
- 1.9 **Landlord** means the City of Holdfast Bay and includes:
- (a) the successors and the assigns of the Landlord if the Landlord is a body corporate; and
  - (b) (where the context allows) any servants workmen or agents of the Landlord,
- 1.10 **Landlord's Property** means all Landlord's fixtures, fittings, plant, equipment, services, chattels and any other goods installed or situated in or on the Land by or behalf of the Landlord and available for use by the Tenant.
- 1.11 **Outgoings** means (to the extent that the same are not specifically payable by any tenant of the Building or the Tenant pursuant to this Lease) all amounts paid or payable by the Landlord or payments which the Landlord incurs or may be or become liable for in any one Accounting Period or in any other lesser or relevant period in respect of the Land whether by direct assessment or otherwise howsoever and includes:
- (a) all rates taxes charges assessments outgoing levies and impositions whatsoever which may be assessed charged or imposed in respect of the Land including any charges for excess water but excluding income tax capital gains tax and all other taxes applicable to income or capital gain payable by the Landlord;
  - (b) all insurance premiums and other charges including stamp duty payable by the Landlord in relation to policies of public risk insurance covering the Building and the Landlord's Property therein (including all glass if applicable) against normal and usual risks deemed necessary by the Landlord (including but without limiting the generality thereof loss or damage by fire, explosion, storm, lightning, earthquake, tempest, flood, burst pipes, impact, aircraft and articles dropped therefrom, riot, civil commotion and malicious or accidental damage, loss of rent and machinery breakdown) to the full insurable value thereof;
  - (c) insurance premiums and other charges including stamp duty for workers compensation insurance for all employees of the Landlord engaged in employment in the Building;
  - (d) the costs of electricity or other sources of energy consumed in the production and reticulation of chilled water and conditioned air for the air conditioning equipment servicing the Building and all other costs arising from the operation of the air conditioning system including but not limited to fuel oil grease labour and a full comprehensive maintenance contract (if any);
  - (e) all costs in connection with the repair, maintenance, operation, supply, replacement and renovation of lifts, air conditioning equipment, fire protection equipment, all other services and plant and equipment in the Land from time to time;
  - (f) all costs in connection with the cleaning, lighting, heating and air-conditioning of the Land and the Common Areas and providing supplies and consumables for toilets, washrooms and other facilities provided to the Land;
  - (g) all costs in connection with the maintenance, repair, replacement and renovation of car parking areas, pedestrian areas and landscaped areas within and around the Land;
  - (h) all costs in connection with caretaking and security services;
  - (i) all costs (including employment and other usual employment on-costs) of the management, control and administration of the Land;
  - (j) the cost of maintaining lighting servicing and repairing the Building such cost comprising the gross costs and expenses of every kind and nature incurred by the Landlord including but not limited to the replacement of parts necessary to keep any of the plant, machinery and equipment in good working order and condition, resurfacing and repainting, pest control, and caretaking services, emergency evacuation systems and procedures, access

control systems, replanting and re landscaping, directional signs and other markers, patrol of the Common areas and supervision of traffic directions when reasonably required, car stops, lighting and other utilities and the cost of electricity consumed therein and all things necessary in the reasonable opinion of the Landlord for the operation maintenance repair and/or renovation of the Common Areas in a state of good and sanitary order condition and repair;

- (k) all reasonable legal, accounting and other professional fees incurred in connection with the conduct and operation of the Building and in particular any such fees of and incidental to the preparation of any estimates or statements of Outgoings or otherwise required to be furnished by the Landlord to the Tenant hereunder or at law; and
- (l) all and any other expenditure costs or expenses incurred by the Landlord in or about or incidental to the Building or the Land not hereinbefore expressly referred to.

1.12 **Premises** means the premises specified in Item 2 of Schedule 1 and includes any improvements and Landlord's Property erected or located on the Premises from time to time.

1.13 **Rent** means the rent payable under this Lease.

1.14 **Review Date** means the respective date(s) set out in Item 7 of Schedule 1.

1.15 **Rules and Regulations** means the procedures and rules and regulations annexed hereto and so entitled and or as may from time to time be made, varied or amended by the Landlord pursuant to this Lease.

1.16 **Services** means the services (such as gas, electricity, water, sewerage, drainage, communications, fire fighting, air conditioning, lifts, plant, equipment, grease trap, range hood, pipes and cables) to or of the Building or any premises in or the Land, provided by authorities, the Landlord or any person authorised by the Landlord.

1.17 **Tenant** means the Tenant named in Item 1 of Schedule 1 and includes:-

- (a) the executors administrators and permitted assigns of the Tenant if the Tenant is a natural person;
- (b) the successors and the permitted assigns of the Tenant if the Tenant is a body corporate;
- (c) any and all trust or trusts of which the Tenant is trustee; and
- (d) (where the context allows) any servants workmen or agents of the Tenant and any other person in or about the Land at any time at the request or invitation of or under the control or direction of the Tenant.

1.18 **Tenant's Property** means any and all fixtures and fittings and other equipment installed in or brought on to or kept in the Premises by the Tenant.

1.19 **Tenant's Proportion** means the same proportion as the lettable area of the Premises bears to the whole of the lettable area of the Building, such lettable areas to be determined in accordance with the Property Council of Australia 1997 method of measurement or such other method of measurement as the Landlord reasonably determines.

1.20 **Term** means the term specified in Item 5 of Schedule 1 and includes the term of any extension or renewal and period of holding over of this Lease.

1.21 Headings to clauses shall not form part of this Lease or be used for the purpose of interpretation but shall be deemed to be for the purpose only of facilitating reference to the various provisions of this Lease.

1.22 Where the context of this Lease permits or requires:

- (a) words in the singular shall include the plural and words in the plural include the singular;
- (b) words of or importing the masculine gender include the feminine gender; and

(c) words referring to a person include a body corporate.

1.23 A reference to any statute code or regulation includes all amendments and revisions made from time to time to that statute code or regulation and any statute code or regulation passed in substitution therefor or incorporating any of its provisions.

1.24 Any provision of this Lease which by virtue of any statute or law that is invalid void or unenforceable, is capable of severance without affecting any other provision of this Lease.

1.25 Unless otherwise stated, the Landlord may in its discretion give (conditionally or unconditionally) or withhold any approval or consent under this Lease.

1.26 If the Tenant comprises two or more persons the word "Tenant" will apply to them jointly and each of them severally.

## 2. GRANT OF LEASE

The Landlord grants and the Tenant accepts a lease of the Premises for the Term as set out in this Lease.

## 3. RENT AND RENT REVIEW

### 3.1 Rent

(a) The Tenant must pay the rent as specified in Item 6 of Schedule 1 and reviewed in accordance with the terms of this Lease to the Landlord as directed from time to time by the Landlord or the Landlord's agent.

(b) The Tenant must pay the rent in advance, the first payment to be made on or before the Commencement Date and subsequent payments must be made on the same day of each calendar month during the Term without any abatement, deduction or demand.

### 3.2 Rent Review

(a) The rent will be reviewed as at the times and in the manner specified in Item 7 of Schedule 1.

3.3 Until the rent is determined or agreed in accordance with the relevant rent review formula the Tenant will continue to pay to the Landlord rent at the rate applicable immediately prior to the relevant Review Date. On the first day for payment of rent after the rent is determined or agreed in accordance with this clause the Tenant must pay the new rent to the Landlord together with an adjustment (if any) in respect of the period from the date of the rent review until the date of such payment.

3.4 The rent payable pursuant to any review of rent will in no case be less than the rent payable immediately prior to the relevant Review Date.

## 4. GST

Unless otherwise stated in Item 6 of Schedule 1, rent and other monies payable by the Tenant to the Landlord pursuant to this Lease do not include any GST. If GST is chargeable with respect to the payment by the Tenant to the Landlord of rent and or other monies pursuant to this Lease, the Tenant must on demand pay the GST or reimburse the Landlord for any GST paid or payable by the Landlord with respect to such rent and or other monies. The Landlord must provide to the Tenant an appropriate tax invoice in respect of any such GST payment or re-imburement by the Tenant.

## 5. RATES, TAXES AND OUTGOINGS

### 5.1 Rates and Taxes

The Tenant must pay or reimburse to the Landlord the Tenant's Proportion of all present and future rates charges taxes levies assessments duties impositions and fees (including council rates and emergency services levy) levied, assessed or charged in respect of the Premises or upon the owner or occupier of the Premises and such payments must be adjusted between the Landlord

and the Tenant as at the Commencement Date and the end or termination date of this Lease in respect of that portion of the Accounting Period the relevant cost was incurred.

## 5.2 Utility Charges

- (a) The Tenant must pay as and when the same fall due, all charges for gas electricity oil and water separately metered and consumed in or on the Premises and also all charges in respect of any telephone services connected to the Premises and all other charges and impositions imposed by any public utility or authority for the supply of any other utility service separately supplied or consumed in respect of the Premises.
- (b) If the Tenant defaults in payment of any of the charges referred to in clause 5.2(a) then the Landlord may pay the same and recover the amount paid as if the same were rent in arrears payable by the Tenant.

## 5.3 Payment Of Outgoings

- (a) The Tenant must pay the Tenant's Proportion of the Outgoings by way of equal monthly payments together with the rent each month or by way of lump sum payments as Outgoings are incurred or payable by the Landlord (as the Landlord may direct). If the period in which any particular outgoing is payable does not coincide with a year of this Lease, the amount the Tenant is to pay in the first and last years of this Lease is to be adjusted proportionately.
- (b) The Landlord will calculate the actual amount payable by the Tenant pursuant to clause 5.3(a) as soon as possible after 30 June in each Accounting Period and will adjust any difference. Any over-payment by the Tenant will be credited to the first payment due by the Tenant after the assessment is made (or refunded if this Lease is at an end) and any under-payment by the Tenant shall be added to the first payment to be made by the Tenant after the assessment is made (or will be paid by the Tenant on demand if this Lease is at an end).

# 6. MAINTENANCE AND REPAIRS

## 6.1 Maintenance

- (a) The Tenant must keep and maintain the Premises, the Tenant's Property and any Services situated within the Premises and which exclusively service the Premises in good and substantial repair and condition and where appropriate in good working order, which includes an obligation to ensure that all electrical wiring and appliances are at all times in a safe condition.
- (b) If the Landlord so requires, the Tenant must enter into a service and maintenance contract in respect of any airconditioning plant and equipment exclusively servicing the Premises, which contract must be first approved by the Landlord (such approval not to be unreasonably withheld).
- (c) If the Landlord so requires, the Tenant must promptly repair any damage to the Land including the Building caused or contributed to by the act, omission, negligence or default of the Tenant. Any work must be undertaken by appropriately qualified contractors and/or tradesmen and in a proper and professional manner.
- (d) In addition to the maintenance, repair and replacement obligations outlined in this clause 6.1 (and this Lease generally) the respective responsibilities of the Landlord and the Tenant for the maintenance that is reasonably expected to be needed during the Term including planned structural maintenance, painting and replacement or renovation works are set out in Schedule 2 (**Maintenance**).
- (e) Where the Tenant is responsible for any Maintenance pursuant to the terms of this Lease, the Tenant must, at the same time as providing a copy of its annual report in accordance with clause 11, provide a report to the Landlord setting out the amount of money which



the Tenant proposes to set aside in the following year for Maintenance.

- (f) The Tenant must, when requested to do so by the Landlord, provide the Landlord with:
  - A. a copy of all invoices, receipts, records, reports, certificates and other related information in relation to all maintenance, repair and replacement works carried out by (or on behalf of) the Tenant during the Term;
  - B. a report setting out all projected items of Maintenance, the approximate date when each item of maintenance is likely to be required and the estimated cost; and
  - C. a report setting out the amount of money currently set aside by the Tenant for Maintenance.

## 6.2 Maintenance of Plant and Equipment

If the Tenant exclusively uses any plant or machinery installed in the Premises or the Landlord installs any plant or machinery at the request of the Tenant within or servicing the Premises then the Tenant must keep all such plant or machinery maintained serviced and in good repair and will enter into and keep current at the Tenant's expense such maintenance service and repair contracts as are reasonably required by the Landlord for that purpose with contractors approved by the Landlord.

## 6.3 Tenant's Other Maintenance Obligations

The Tenant must at the Tenant's expense:

- (a) ensure that all waste is placed daily in suitable receptacles and subject to this clause 6, ensure the Premises is cleaned regularly in a proper and professional manner and ensure all waste and refuse is promptly and regularly removed from the Land;
- (b) as soon as is reasonably possible make good any damage to any part of the Building (including the Common Areas) or to the Premises or any part thereof (including ceilings) caused or contributed to by the Tenant;
- (c) immediately replace all broken glass in respect of the Premises;
- (d) take all proper precautions to keep the Premises free from pest infestation and if required by the Landlord engage a pest exterminator approved by the Landlord for that purpose;
- (e) repair or where appropriate replace any Landlord's Property such as heating lighting electrical and plumbing fittings installed in the Premises broken or damaged by the Tenant;
- (f) comply with all statutes ordinances proclamations orders and regulations affecting the Premises or any fixtures or fittings installed by the Tenant; and
- (g) comply with any notices or orders which may be given by any statutory or regulatory authority in respect of the Premises or their use by the Tenant and keep the Landlord indemnified for all such matters.

## 6.4 Repairs

If at any time during this Lease the Landlord, or the Landlord's agents or contractors find any defect decay or want of repair in the Premises or find any state or condition thereof contrary to any covenant or agreement on the part of the Tenant contained in this Lease, the Landlord, or the Landlord's agent or contractor may give to the Tenant notice in writing to make good repair restore or amend the same within a reasonable time to be therein stated and the Tenant must within such time sufficiently and in good and proper and professional manner make good repair restore or amend the same to the reasonable satisfaction of the Landlord and if the Tenant fails to comply with any such notice the Landlord may (but is not obliged to do so) by or with the Landlord's attorney agent and or contractors enter into and upon the Premises and carry out the requirements of such notice (causing as little disturbance to the Tenant as is practicable). All

costs charges and expenses incurred by the Landlord in so doing will be a debt due from the Tenant to the Landlord payable on demand and recoverable in the same manner in all respects as the rent hereby reserved.

#### 6.5 Cleaning

- (a) The Tenant must ensure the Premises is routinely and properly cleaned (including without limitation to arrange for all rubbish waste and garbage to be regularly removed from the Premises).
- (b) If the Landlord provides or requires a service for the routine cleaning of the Building or the Premises then the Tenant must, if reasonably requested by the Landlord, use such service for the cleaning of the Premises (to the extent the service applies) and must permit the Landlord's cleaning contractors to have access to the Premises at all reasonable times for the purpose of carrying out such cleaning. The Tenant must pay to the Landlord in addition to the rent and as and when required by the Landlord, all costs of the cleaning of the Premises and the Tenant's Proportion of the overall costs of the cleaning of the Building (including any Common Areas).

#### 6.6 Notice of Defect

The Tenant must promptly give notice to the Landlord (or where appropriate to the appointed agent of the Landlord) of:

- (a) any damage and of any accident to or defect or want of repair in the Land or in the Premises or in any Services or other facilities provided by the Landlord and including any danger, risk or hazard; or
- (b) any circumstance or event which the Tenant ought reasonably be aware might cause danger, risk or hazard to any person within the Premises or the Building.

#### 6.7 Common Areas and Grounds

The Tenant must not deposit or cause permit or suffer to be deposited any debris refuse or rubbish of any kind in or on any Common Areas grounds gardens yards lanes ways or rights of way or in or on any public road or footway abutting upon or adjacent to the Premises or the Land.

#### 6.8 Inspection and Landlord Works

The Tenant must permit the Landlord and the Landlord's agents and contractors and all persons authorised by them at all reasonable times of the day and on reasonable notice to enter the Premises to examine the state of repair and condition thereof, carry out and observe the Landlord's maintenance and repair obligations as set out in Schedule 2, and execute repairs or to paint the Premises or any part thereof (which the Landlord may do without prejudice to any covenant or agreement on the part of the Tenant contained in this Lease). The Landlord in executing such repairs or painting must use reasonable endeavours to cause as little disturbance to the Tenant as is practicable.

#### 6.9 Employment of Contractors

If any work has to be done by the Tenant in or about the Premises in order to comply with the Tenant's obligations pursuant to this Lease the Tenant must engage and employ only such contractors as have a public liability policy for an amount which in the reasonable opinion of the Landlord is adequate and who are previously approved of in writing by the Landlord or the Landlord's architect.

#### 6.10 Repainting

At or immediately before the expiration or earlier determination of this Lease, the Tenant shall repaint with two coats of premium quality paint in a thorough and workmanlike manner those internal parts of the Premises which previously have been painted. Such painting shall be done

in such manner and with such paint as the Landlord may reasonably direct.

#### 6.11 Capital and Structural Works

Nothing contained in clauses 6.1 to 6.10 (inclusive) shall oblige the Tenant to do work of a structural or capital nature unless such work is required as a result of the act, neglect or default of the Tenant or would not have been required but for the Tenant's use or occupancy of the Premises.

### 7. ALTERATIONS AND ADDITIONS

#### 7.1 Alterations by Tenant

- (a) The Tenant must not install or use in the Premises internal partitions other than of a standard and specification previously approved in writing by the Landlord.
- (b) The Tenant must not install or place in the Premises any heavy item fixture or fitting which may (in the reasonable opinion of the Landlord) cause unreasonable noise or vibrations, overload the switchboard or cause structural or other damage to any part of the Building.
- (c) The Tenant must not make alterations or addition to the Premises nor install or alter any partitioning or temporary or permanent structures or fittings in the Premises without the Landlord's prior written approval, and:
  - A. in seeking the Landlord's approval to a proposed alteration, addition or installation the Tenant must submit plans and specifications of the proposed work;
  - B. if the Landlord agrees to grant its approval, then such approval may be granted subject to any conditions the Landlord considers appropriate, including:
    - i. any such work be supervised by a person nominated by the Landlord;
    - ii. any such work be executed by contractors or tradesmen in a proper and professional manner under the supervision of appropriately qualified persons approved by the Landlord with public liability insurance for an amount that in the reasonable opinion of the Landlord is adequate;
    - iii. the Tenant pays all reasonable costs incurred by the Landlord in considering the proposed works and their supervision including the fees of architects or other consultants employed by the Landlord;
    - iv. the Tenant obtains all necessary approvals or permits necessary to enable such proposed work to be lawfully effected and on request by the Landlord produces for inspection to the Landlord copies of all such approvals and permits;
    - v. upon completion of the works, the Tenant must produce to the Landlord any certificates of compliance issued by any such statutory or regulatory authority; and
    - vi. the Tenant reimburses the Landlord any reasonable cost or expense that it incurs as a result of the installation operation or removal of any such equipment fixture fitting or machinery.

#### 7.2 Alterations by Landlord

- (a) The Tenant will permit the Landlord and any person authorised by the Landlord:
  - A. to carry out inspections of or modifications or additions to or other works on the Land (including the Premises where the Landlord has given reasonable prior notice to the Tenant); and
  - B. where the Landlord has given reasonable prior notice to the Tenant to enter the Premises for the purpose of carrying out such works causing as little disturbance as

is practical to the Tenant in undertaking such works provided that the Landlord may not commence to carry out any alteration or refurbishment to the Land (other than routine maintenance or repairs) that is likely to adversely affect the Tenant's use of the Premises unless:

- C. the Landlord has given the Tenant at least one (1) month's notice of the proposed alteration or refurbishment; or
  - D. the alteration or refurbishment is required by an emergency and the Landlord has given the Tenant the maximum period of notice that is reasonably practicable in the circumstances;
- (b) Subject to the preceding subclause in an emergency the Landlord may without notice enter the Premises and carry out any works deemed necessary by the Landlord;
- (c) Except as permitted by the Act, the Tenant will not make any claim or commence any action against the Landlord for breach of this clause or otherwise in respect of such entry on to the Premises or the execution of any of the works contemplated by this clause.

## 8. GREASE TRAP AND RANGE HOOD

Deleted

## 9. ASSIGNMENT AND OTHER DEALINGS

### 9.1 Assignment, Subletting and Disposal of Tenant's Interests

- (a) The Tenant must not transfer or assign the Premises or any part thereof or assign, transfer or otherwise dispose of this Lease without the Landlord's prior written consent. The Landlord's consent may be withheld in the Landlord's absolute discretion.
- (b) The Tenant must:
- A. request the Landlord's consent to an assignment, transfer or other disposition of the Premises or this Lease in writing;
  - B. promptly provide the Landlord with information the Landlord reasonably requires about the financial standing and business experience of the proposed assignee; and
  - C. before requesting the Landlord's consent to a proposed assignment of the Premises or this Lease, the Tenant must furnish the proposed assignee with:
    - i. a copy of any disclosure statement given to the Tenant in respect of this Lease;
    - ii. details of any changes that have occurred in respect of the information contained in that disclosure statement since it was given to the Tenant (being changes of which the Tenant is aware or could reasonably be expected to be aware); and
    - iii. comply with any other procedural requirements of the Landlord.
- (c) To enable the Tenant to comply with the preceding subclause, the Tenant may, in writing, request the Landlord to provide the Tenant with a copy of the disclosure statement concerned and if the Landlord does not comply with such a request within fourteen (14) days after it is made, the preceding subclause will not apply to the Tenant in respect of the assignment transfer or other disposition in relation to which the disclosure statement applies.
- (d) The Landlord may withhold the Landlord's consent to the assignment of the Premises or this Lease in any of the following circumstances:
- A. if the proposed assignee proposes to change the use to which the Premises are put;
  - B. if the proposed assignee is unlikely (in the Landlord's reasonable opinion) to be able

to meet the financial obligations of the Tenant under this Lease;

- C. if the proposed assignee's business skills are inferior (in the Landlord's reasonable opinion) to those of the Tenant, or
  - D. if the Tenant has not complied with procedural requirements for obtaining the Landlord's consent.
- (e) Nothing in clause 9.1(d) will prohibit the Landlord from granting the Landlord's consent to an assignment, transfer or other disposition of this Lease subject to the Tenant complying with such reasonable conditions as the Landlord considers appropriate.
- (f) Nothing in the preceding provisions of clause 9.1(d) prevents the Landlord from requiring payment of a reasonable sum for legal or other expenses incurred in connection with such a consent (whether consent is granted or not).
- (g) The Landlord may as a condition of granting its consent require that the proposed transferee or assignee provide to the Landlord such guarantee or guarantees of the transferee's or assignee's performance of the Tenant's obligations under this Lease which the Landlord requires.
- (h) The Tenant must not:
- A. grant a sub-lease, licence of concession for the whole or any part of the Premises;
  - B. part with or share possession of the whole or any part of the Premises; and
  - C. mortgage or otherwise change or encumber the Tenant's interest in this Lease, without the Landlord's prior written consent, which consent the Landlord is not obliged to give notwithstanding anything to the contrary in this Lease.
- (i) If the Tenant is a company (except a company whose shares are listed on a stock exchange in Australia) a transfer of shares (except as a result of inheritance) totalling more than one half of the issued share capital of the Tenant, or of the controlling interest of the Tenant will be deemed to be an assignment of this Lease requiring the prior written consent of the Landlord.

## 10. USE OF PREMISES

### 10.1 Permitted Use

- (a) The Tenant must use the Premises only for the purpose specified in Item 4 of Schedule 1 or other purposes incidental thereto or for such other purposes for which the Landlord may give prior written approval.
- (b) The Tenant must not use the Premises or any part thereof nor cause permit or allow anyone to sleep on the Premises, nor carry on or cause permit or allow to be carried on upon the Premises or any part thereof for any noxious noisome or offensive art trade business occupation or calling and must not use the Premises or any part thereof or cause permit or allow the same to be used for any unlawful purpose.

### 10.2 No Warranty by Landlord

The Tenant warrants to the Landlord that the Tenant has relied on the Tenant's own judgement and expertise and the Tenant's experts in deciding that the Premises are suitable for the Tenant's purposes and that the Landlord has given no promise, representation or warranty to the Tenant as to the use to which the Premises may be put and that the Tenant has satisfied itself thereof and the Tenant will be deemed to have accepted this Lease with full knowledge of, and subject to, any prohibition or restrictions on the use thereof under or in pursuance of any Act, Ordinance, Regulation, By-law or other statutory enactment or order of Court. Should the Permitted Use require the consent of any authority under or in pursuance of any such Act, Ordinance, Regulation, By-law or other enactment or order of Court the Tenant must obtain such consent at the Tenant's own cost and expense. To the fullest extent permitted by law all

warranties as to suitability and as to adequacy implied by law are hereby expressly negated.

### 10.3 Signs

The Tenant must not allow any advertisement notice poster hoarding or sign to be affixed to or placed near any window in the Premises so as to be visible from the outside of the Building except where the Landlord's consent is obtained and where all relevant laws and statutory requirements are satisfied.

### 10.4 Compliance with Acts, By Laws and Regulations

The Tenant must at the Tenant's cost and expense:

- (a) comply with every notice order or requirement relating to the Premises and requiring any condition defect or want of reparation to be remedied which may be given or made to the Landlord or to the Tenant in pursuance of the *South Australian Public Health Act (2011)* (SA) and or the *Local Government Act (1999)* (SA) or Acts for the time being in force in the State of South Australia and or any other Act or Acts of Parliament or any by-laws rules or regulations made under or in pursuance of any such Act or Acts or purporting so to be and will comply therewith within the time limited therein for complying therewith. If the Tenant fails to comply with any statutory or regulatory obligations the Landlord may comply therewith (but it not be obligatory for the Landlord to do so) and all costs charges and expenses incurred by the Landlord in so doing will be a debt due and recoverable from the Tenant in the same manner in all respects as the rent is recoverable; and
- (b) take such precautions against fire on and in respect of the Premises as are or may from time to time be required under or in pursuance of any Statute now or hereafter in force or which may be required by any authority (whether Governmental municipal civic or other) having jurisdiction in relation thereto and also at the Tenant's own expense in all things, do all such other acts matters and things in relation to fire safety as are or may from time to time be directed or required to be done or executed (whether by the owner or occupier of the Premises) by any authority (whether Governmental municipal civic or other) having jurisdiction in relation thereto pursuant to any law now or hereafter in force.

### 10.5 Use of Premises and Provision of Emergency Number

The Tenant must:

- (a) advise the Landlord (or where applicable the Landlord's agent) of the telephone number of the Tenant's nominated emergency after hours contact and must keep the Landlord or the Landlord's agent informed of any change of such telephone number;
- (b) secure the Premises against unauthorised entry at all times when the Premises are left unoccupied and the Landlord reserves the right to enter upon the Premises and secure the Premises if left unsecured;
- (c) not do anything whereby the Services such as the working or efficiency of the air conditioning plant servicing the Building or the Premises may be affected;
- (d) upon the cessation of the Tenant's right to occupy the Premises, deliver to the Landlord or the Landlord's Agent all keys and or access cards to the Premises; and
- (e) observe the Rules and Regulations.

### 10.6 Restrictions on Use

The Tenant must not:

- (a) use or permit to be used for other than their designed purposes any of the fixtures or fittings in the Premises or the Building;
- (b) store or use inflammable or dangerous substances upon the Premises (except as may be

necessary for the ordinary conduct of the Permitted Use of the Premises by the Tenant in which case the Tenant undertakes to notify the Landlord in writing of the maximum quantity of any such inflammable or dangerous substance that the Tenant intends to store on the Premises);

- (c) cause permit or allow on the Premises or in the Building anything which in the reasonable opinion of the Landlord may become a nuisance or disturbance obstruction or cause of damage whether to the Landlord or to other tenants or users of the Building nor use the Premises in any noisy noxious or offensive manner;
- (d) do any act or thing, or permit any activities which may discredit the Landlord;
- (e) obstruct or interfere with any of the entrances of the Building or Common Areas;
- (f) permit any sign advertisement name or notice to be placed on any part of the Premises or the Building where such sign advertisement name or notice is of an incongruous or unsightly nature having regard to the character and use of the Building and prior to the installation or placement of any sign advertisement name or notice the Tenant must:
  - A. obtain the Landlord's prior written consent; and
  - B. obtain the prior consent of any relevant statutory or regulatory authority;
- (g) use or permit to be used any radio record player tape or video recorder television loudspeaker screen or other like equipment likely to be heard or seen from outside the Premises; or
- (h) conduct or permit to be conducted on the Premises any auction or fire sale.

#### 10.7 Heavy Machinery

- (a) The Tenant must not bring upon the Premises any heavy machinery or other plant or equipment not reasonably necessary or proper for the conduct of the Tenant's permitted use of the Premises. In no circumstances must the Tenant bring upon the Premises any heavy machinery or other plant or equipment:
  - A. of such nature or size or weight as to cause or (in the reasonable opinion of the Landlord) be likely to cause any structural or other damage to the floors or walls or any other parts of the Land, or
  - B. of such construction or manufacture as to cause to emanate therefrom any noise or vibration or noxious odour fume or gas that could pervade the Premises or escape therefrom to the discernible notice of any person outside the Premises.
- (b) Prior to bringing upon the Premises any heavy machinery or other plant or equipment permitted to be brought upon the Premises the Tenant must inform the Landlord of the Tenant's intention so to do and the Landlord or the Landlord's architects or engineers may direct the routing installation and location of all such machinery plant and equipment. The Tenant must observe and comply with all such directions and any reasonable fees payable to the Landlord's architects or engineers in connection with ascertaining the safest and most favourable and convenient method of routing installing and locating such machinery plant and equipment as aforesaid must be paid by the Tenant on demand.

#### 10.8 Alcohol

Except as otherwise permitted by the terms and conditions of this Lease, the Tenant must not under any circumstances allow alcohol onto the Land and must ensure that its patrons, members and visitors do not bring alcohol onto the Land.

#### 10.9 Locks and Keys

The Tenant must not tamper with or change any lock of the Premises or have any keys of such locks cut without the consent of the Landlord or its agent. The Tenant will pay for any keys or

change required to any lock and in the event of the Landlord or its agent being required to open the Premises the Tenant will pay a reasonable fee fixed by the Landlord or the Landlord's agent.

#### 10.10 Use of Conduits

The Tenant must allow the Landlord and other occupiers of the Land the free and uninterrupted passage of gas water and electricity through and along the services including electrical services situated under in or on the Premises.

#### 10.11 Blinds and Awnings

The Tenant must not erect or affix any blinds or awnings to the outside of the Premises or any blinds to the interior of the windows display windows or doors thereof or affix any fittings to the floors walls or ceilings of the Premises without the prior consent in writing of the Landlord which consent may be granted or refused or granted subject to conditions in the discretion of the Landlord.

#### 10.12 Airconditioning

- (a) Where any plant machinery or equipment for heating cooling or circulating air is provided or installed by the Landlord in the Premises or in the Building for the benefit of tenants of the Building (**airconditioning plant**):
  - A. the Tenant must comply with and observe the reasonable requirements of the Landlord in respect of the airconditioning plant;
  - B. to the maximum extent permitted by law, the Landlord will be under no liability to the Tenant in respect of the Landlord's inability or failure to operate service maintain replace or repair the airconditioning plant at any time for any reason and the Tenant acknowledges that the Landlord does not warrant that the airconditioning plant (if any) is suitable or adequate for the business to be conducted in the Premises by the Tenant; and
  - C. the Tenant must permit the Landlord and all persons authorised by the Landlord at all reasonable times on giving to the Tenant reasonable prior notice (except in the case of emergency where no notice is required) to enter the Premises to view the state of repair of the airconditioning plant and there remain for the purpose of carrying out any necessary or desirable maintenance servicing or repair to or replacement of the airconditioning plant.
- (b) Where any airconditioning plant is installed in the Premises or the Building for the exclusive use of the Tenant, the Tenant must keep such airconditioning plant in good repair, condition and working order and must pay all costs of operating and maintaining the same.

#### 10.13 Electricity Supply

If the Landlord and the Tenant have entered into an agreement as to the supply by the Landlord to the Tenant of electricity for the Premises then the terms and conditions of such agreement will apply to the parties and any breach by the Tenant of that agreement will be deemed to be a breach by the Tenant of this Lease. In the absence of any such agreement between the Landlord and the Tenant, the following provisions apply:

- (a) If at the Commencement Date the Landlord supplies electricity to the Premises and requires the Tenant to purchase such electricity from the Landlord, the Tenant must pay to the Landlord for all such electricity at such rate as the parties may agree from time to time and in the absence of such agreement at the maximum rate applicable under the *Electricity (General) Regulations 2012 (SA)*.
- (b) Notwithstanding clause 10.13(a), there is no obligation on the Landlord to supply or continue to supply electricity to the Premises and upon giving at least sixty (60) days prior



written notice to the other either:

- A. the Landlord may elect to cease selling electricity to the Tenant, or
  - B. the Tenant may elect to cease purchasing electricity from the Landlord.
- (c) If either the Landlord elects to cease selling electricity to the Tenant or the Tenant elects to cease purchasing electricity from the Landlord in accordance with the preceding subclause, the Tenant must on or before the time at which such sale and purchase is to cease pursuant to the notice given in accordance with clause 10.13(b):
- A. enter into a contract to purchase electricity for the Premises from a licensed electricity retailer of the Tenant's choice;
  - B. ensure that any such contract contains a provision that such electricity retailer must provide details to the Landlord concerning the Tenant's consumption of electricity in or in relation to the Premises; and
  - C. install at no cost to the Landlord such new or additional equipment and meters as may reasonably be necessary to supply and record the supply of electricity to the Premises.
- (d) If the Tenant is supplied electricity via an Inset Network (as defined in the *Electricity (General) Regulations 2012 (SA)* on the Land, the Tenant must pay to the Landlord the Tenant's share of Inset Network charges such share to be as is reasonably determined by the Landlord from time to time taking into account the quantum of electricity provided to the Premises and the quantum of electricity provided to other premises situate on the Land.
- (e) Save to the extent caused or contributed to by the Landlord's negligence, the Landlord shall not be liable to the Tenant for any failure of electricity supply to the Premises.

## 11. TENANT GOVERNANCE

Deleted

## 12. INSURANCE

### 12.1 Tenant's Insurance

At its own expense, the Tenant shall maintain during the term of this Lease the following insurance:

- (a) a policy of public risk insurance with respect to the Premises and the business or businesses carried on in the Premises for a sum of not less than the amount specified in Item 8 of Schedule 1. Such amount shall be in respect of any one single accident or event and extend to claims, loss and damage the subject of the indemnity contained in clause 13.2;
- (b) a policy to insure all permitted additions to the Premises carried out by the Tenant and to insure all of the Tenant's fixtures, fittings and property including stock against loss or damage by any cause and for their full replacement value; and
- (c) plate glass insurance in respect of all plate glass (including windows) in the Premises.

### 12.2 Certificates of Insurance

All policies of insurance shall be taken out with a recognised and reputable public insurance office and the Tenant shall provide the Landlord with copies of certificates of insurance in relation to the policies upon request. The policies of insurance specified in clauses 12.1(a) and 12.1(c) shall be in the name of the Tenant and note the interest of the Landlord.

### 12.3 Tenant Not to Cause Premium to Increase

The Tenant shall not do or fail to do anything which may increase the rate of premium payable

under any policy of insurance taken out in respect of the Premises. The Tenant shall pay within fourteen (14) days of demand any additional or increased premium levied on account of the Tenant's use or occupation of the Premises in respect of any policy of insurance effected in respect of the Land or its contents or any policy of public liability insurance effected by the Landlord.

### **13. INDEMNITY, RELEASE AND RISK**

#### **13.1 Risk of Tenant**

The Tenant agrees to occupy and use the Premises and to enter the Land at its own risk. The Tenant releases to the fullest extent permitted by law the Landlord (and its agents, contractors and employees) from every claim and demand which may result from an accident, damage or injury occurring on the Premises or on the Land. The Landlord shall not be released from liability to the extent that the accident, damage or injury was caused by the negligence of the Landlord.

#### **13.2 Indemnity by Tenant**

The Tenant indemnifies the Landlord and will at all times keep the Landlord indemnified against all costs, losses, damages or actions incurred by or brought against the Landlord directly or indirectly arising from the use or occupation of the Premises by the Tenant or from any action or non-action whatsoever on the part of the Tenant.

#### **13.3 Interruption of Services**

The Landlord will not be responsible or liable to the Tenant or to any person claiming by, through or under the Tenant for the failure of any equipment or machinery in the Premises or the Building or for their ineffectual operation or for any damage or loss caused by or arising out of them or for the interruption or failure of any services, including the supply of electricity, gas and water.

### **14. TENANT'S YIELDING UP OBLIGATIONS**

14.1 The Tenant must immediately prior to vacating the Premises at the expiration or sooner determination of this Lease (or in the case of the determination of the Term of this Lease within a reasonable time after such determination):

- (a) complete any repairs and maintenance which the Tenant is obliged to carry out under this Lease;
- (b) remove all of the Tenant's Property in or on the Premises or the Land and immediately make good any damage caused by such removal;
- (c) wash down the Premises and treat as previously treated all internal surfaces of the Premises by painting staining polishing or otherwise to a specification reasonably approved by the Landlord and to the reasonable satisfaction of the Landlord;
- (d) replace all damaged and non-operative light bulbs and fluorescent tubes in the Premises with new light bulbs and fluorescent tubes;
- (e) thoroughly clean the Premises throughout, remove all refuse therefrom leaving the Premises in a clean, tidy, secure and safe condition;
- (f) comply with all reasonable requirements and directions of the Landlord in respect of all removal and reinstatement works; and
- (g) hand over to the Landlord all keys and other security devices for the Premises which the Tenant has in its possession or control.

14.2 If the Tenant does not complete such removal and making good on the expiration of the Term (or in the case of the determination, within a reasonable time after such determination) then (without prejudice to any other rights of the Landlord) the Landlord may undertake such obligations and the Tenant must repay on demand all costs and expenses incurred by the

Landlord in so doing.

14.3 In addition to clause 14.2, the Landlord may elect not to effect such removal of the Tenant's Property (including all partitions, alterations and additions) in which case the Landlord may by notice in writing given to the Tenant notify the Tenant that unless the Tenant has effected such removal within fourteen (14) days of the date on which such notice is given such partitions alterations or additions not removed by the Tenant will be forfeited to the Landlord and where the Tenant fails to comply with such notice such partitions alterations and additions will at the expiration of such fourteen (14) day period become the absolute property of the Landlord.

14.4 Until such time as the Tenant has complied with its obligations under clause 14.1 or the date upon which the same have been forfeited to the Landlord pursuant to clause 14.3 (whichever is the earlier) ("**the compliance date**"), the Tenant must pay by way of damages to the Landlord an amount which represents the rent payable immediately prior to the expiration or termination of this Lease calculated on a daily basis multiplied by the number of days between the compliance date and the date of expiration or the termination of this Lease.

## 15. **LANDLORD'S OBLIGATIONS AND RIGHTS**

### 15.1 Quiet Possession

Provided that the Tenant pays the rent and all other monies payable under this Lease and performs and observes the terms conditions and covenants on the Tenant's part to be performed or observed herein contained or implied, the Tenant may quietly enjoy the Premises without unlawful interruption by the Landlord or any person lawfully claiming under or in trust for the Landlord.

### 15.2 Reservation of Services

The Landlord reserves the right for itself and for all others authorised by the Landlord the passage of any air conditioning equipment, fire sprinkler systems, pipes, ducts, cables, wiring, communications, water sewerage and drainage connections and any other services through or along or in or into the Premises and also access to and through the Premises at any time for the purpose of installing, maintaining or repairing any such equipment, systems, pipes, ducts, cables, wirings, connections and Services.

### 15.3 Costs of Proceedings

If the Landlord may without fault on the Landlord's part be made a party to any litigation commenced by or against the Tenant, the Tenant must pay to the Landlord on demand by the Landlord all reasonable legal fees and disbursements (as between solicitor and client) incurred by the Landlord in connection therewith.

### 15.4 Landlord's Right to Add to Building

- (a) The Landlord may at any time during the Term enlarge vary or reduce any Building and in so doing (but without in any way limiting the generality of the foregoing) may:
- A. acquire or dispose of any land;
  - B. permanently encroach upon any Common Areas, portions of the Land including any car park;
  - C. employ or use the air space above or below any part of any Common Areas including any car park;
  - D. erect additional floors above or below any part of the said Building;
  - E. provide multi-deck parking facilities;
  - F. strata title the Building or any one or more of the floors of the Building (in which event the Tenant will execute all relevant documents provided same do not prejudice the Tenant's rights to occupy the Premises upon the terms contained in

this Lease); or

- G. interrupt the water gas electrical air conditioning or other Services to the Premises.
- (b) The Landlord must in carrying out such works use reasonable endeavours to minimise so far as may be practicable any inconvenience to or interruption to the business of the Tenant.

#### 15.5 Right to Enter

- (a) At any time during the Term the Landlord may (except in an emergency when no notice is required) enter the Premises after giving the Tenant reasonable notice:
  - A. to view the state of repair and condition of the Premises;
  - B. carry out any works on the Land or in or to the Building (including alterations and redevelopment), but in these circumstances the Landlord will take reasonable steps (except in emergencies) to minimise interference with the Tenant's use;
  - C. restrict access to the Land including parking areas but in these circumstances the Landlord will take reasonable steps (except in emergencies) to minimise interference with the Tenant's use;
  - D. redirect pedestrian or vehicular traffic into, out of or through the Land;
  - E. close the Building in an emergency;
  - F. use, maintain, repair, alter and add to the Services to or in the Premises, but the Landlord must take reasonable steps (except in emergencies) to minimise interference with the Tenant's use;
  - G. exclude or remove any person from the Land;
  - H. to do anything the Landlord must or may do under this Lease or pursuant to any legal obligation; and
  - I. to carry out and observe the Landlord's maintenance and repair obligations as set out in Schedule 2,

and the Tenant will not be permitted to make any claim or abate any payment if the Landlord exercises any of its rights under this clause 15.5.

- (b) If the Landlord or the Landlord's agents or contractors find any defect decay or want of repair in the Premises or find any state or condition thereof contrary to any covenant or agreement on the part of the Tenant contained in this Lease, the Landlord, or the Landlord's agent or contractor may give to the Tenant notice in writing to make good repair restore or amend the same within a reasonable time to be therein stated and the Tenant must within such time sufficiently and in good and proper and professional manner make good repair restore or amend the same to the reasonable satisfaction of the Landlord and if the Tenant fails to comply with any such notice the Landlord may (but is not obliged to do so) by or with the Landlord's attorney agent or contractors enter into and upon the Premises and carry out the requirements of such notice (causing as little disturbance to the Tenant as is practicable). All costs charges and expenses incurred by the Landlord in so doing will be a debt due from the Tenant to the Landlord payable on demand and recoverable in the same manner in all respects as the rent hereby reserved.

#### 15.6 Interest on Overdue Amounts

If the Tenant does not pay an amount when it is due, and does not rectify such non-compliance within fourteen (14) days of written demand then it must pay interest on that amount on demand from when the amount became due until it is paid in full. Interest is calculated on outstanding daily balances of that amount at the Default Rate.

## 16. DAMAGE TO BUILDING OR PREMISES

16.1 Subject to clause 16.2, if the Building of which the Premises forms part is damaged:

- (a) the Tenant is not liable to pay rent or Outgoings or other charges that are attributable to the period during which the Premises cannot be used or are inaccessible due to that damage;
- (b) if the Premises are still useable but their useability is diminished due to the damage, a fair and just proportion of the rent, Outgoings and other charges payable by the Tenant pursuant to this Lease having regard to the nature of the damage shall abate from the date of the damage until the date that the Premises have become useable. If any dispute as to the amount of rent, Outgoings and charges to be abated arises, the same will be determined by a licensed valuer appointed by the President of the South Australian Division of the Australian Property Institute (or should that body have ceased to exist, the President or other principal officer for the time being of such body or association as then serves substantially the same objects) at the request of the Landlord;
- (c) if the Landlord notifies the Tenant in writing that the Landlord considers that the damage is such as to make its repair impractical or undesirable, the Landlord or the Tenant may terminate this Lease by giving not less than seven (7) days' notice in writing and neither party shall have any claim for or right to recover any compensation by reason of such termination save in respect of any antecedent breach or default or any claim regarding the cause of such damage; and
- (d) if the Landlord fails to repair the damage within a reasonable time after the Tenant requests the Landlord in writing so to do, then the Tenant may terminate this Lease by giving not less than seven (7) days' notice in writing of termination to the Landlord.

16.2 Damage caused by Tenant

If the damage to the Building was caused or contributed to by the wrongful act or negligence of the Tenant no proportion of the rent, Outgoings and charges shall be abated and the Tenant will not be entitled to terminate this Lease.

16.3 Set off

The Landlord may, by notice to the Tenant, set off any amount due by the Tenant to the Landlord under this Lease or otherwise against any amount due by the Landlord to the Tenant under this Lease.

16.4 Damage to Goods or Person

Except to the extent caused by the negligent or wilful act or omission of the Landlord, its servants or agents, the Landlord its attorney or agent shall not be under any liability to the Tenant for any loss expense or damage sustained by the Tenant or any invitee of the Tenant arising out of personal injury or destruction of or damage to goods chattels furniture or effects howsoever caused including by water gas or electricity bursting overflowing leaking or escaping (as the case may be) from any water gas electrical apparatus installation fitting pipe sewer wiring roof or roof gutter down pipe or storm water drain (as the case may be) on in or connected to or appurtenant to the Premises and/or the Building.

## 17. REDEVELOPMENT AND DEMOLITION

17.1 The Tenant acknowledges that:-

- (a) the Landlord may during the term of this Lease decide to refurbish, repair, redevelop or extend the Premises and/or the Building and land of which the Premises form part;
- (b) the Landlord will suffer harm expense and loss if the Landlord elects to do so and is unable to obtain vacant possession of the Premises;
- (c) the Landlord has only agreed to the Tenant's offer to lease the Premises on the condition

the Landlord can obtain vacant possession of the Premises for the purpose of so refurbishing, repairing, redeveloping or extending as and when required by the Landlord; and

- (d) this Lease is expressly subject to a condition precedent that the term of this Lease be subject to the Landlord's right to refurbish, redevelop or extend.

17.2 If during the Term or any extension of the Term the Landlord elects to refurbish, repair, redevelop or extend the Premises, the Building or the Land of which the Premises form part or any part thereof and the Landlord provides to the Tenant details of the proposed repair, redevelop or extension sufficient to indicate a genuine proposal to refurbish, repair, redevelop or extend within a reasonably practicable time after the date upon which the Landlord requires vacant possession of the Premises, then the Landlord may on or after the commencement of this Lease:

- (a) give to the Tenant not less than six (6) months written notice requiring the Tenant to relocate its business to other premises in the Building or on the Land ("new premises") specifying the date on which the Landlord requires vacant possession of the Premises and requires the Tenant to relocate to the new premises ("relocation date") whereupon:-

- A. this Lease will terminate on the relocation date;
- B. not less than seven (7) days prior to the relocation date the Tenant must upon receipt of the same from the Landlord execute and deliver to the Landlord:
  - i. a surrender of this Lease in registrable form by mutual consent and for no monetary or other consideration effective from the relocation date;
  - ii. a lease of the new premises from the relocation date which lease will be upon the terms and conditions hereinafter appearing; and
  - iii. the Tenant's registered duplicate copy of this Lease; and
- C. the Tenant must vacate the Premises and relocate to the new premises on the relocation date;

- (b) the relocation to the new premises will be upon the following terms and conditions:-

- A. the new premises must (in the reasonable opinion of the Landlord) be of comparable quality and utility to the Premises; and
- B. the Landlord will, at its cost, move the Tenant's stock from the Premises to the new premises;
- C. the lease of the new premises shall be on the same terms and conditions as this Lease (changed as necessary),

and the Tenant may, not later than one month (time being of the essence) of receiving the written notice of relocation from the Landlord, notify the Landlord in writing that the Tenant does not intend to enter into a lease for the new premises, in which case the Tenant shall vacate the Premises on the relocation date without any right to compensation or damages from the Landlord by reason of termination of this Lease; and

- (c) give to the Tenant not less than twelve (12) months written notice requiring the Tenant to vacate the premises specifying the date on which the Landlord requires vacant possession of the Premises (the "termination date") whereupon:

- A. this Lease will terminate on the termination date;
- B. not less than seven (7) days prior to the termination date the Tenant must upon receipt of the same from the Landlord execute and deliver to the Landlord such documents as the Landlord reasonably requires to effect a surrender of this Lease as at the termination date; and

C. the Tenant must vacate the Premises on the termination date,  
and the Tenant may at any time after receipt of notice of termination from the Landlord terminate this Lease upon giving not less than seven (7) days prior notice in writing to the Landlord.

**18. RULES AND REGULATIONS**

18.1 The Landlord may from time to time make such rules and regulations that the Landlord considers necessary for the management, safety, security, care of or cleanliness of the Premises or the Building.

18.2 The Landlord reserves the right to amend from time to time the Rules and Regulations.

18.3 The Rules and Regulations bind the Tenant when it receives notice of the Rules and Regulations from the Landlord.

18.4 If there is any inconsistency between this Lease and the Rules and Regulations, then this Lease prevails.

18.5 A failure by the Tenant to comply with the Rules and Regulations is a breach of this Lease.

18.6 The Rules and Regulations applicable at the date of this Lease are those appended to this Lease.

**19. EXTENSION OF TERM**

If not more than six (6) months nor less than three (3) months prior to the expiration of the Term the Tenant gives to the Landlord notice in writing of its desire to extend the Term and if the Tenant is not in breach of any of the covenants agreements and conditions on the part of the Tenant to be performed and complied with, the Tenant (at the Tenant's cost and expense in all things) will be entitled to an extension of the Term for the further period referred to in Item 9 of Schedule 1 at a rent to be fixed in the manner provided by the terms of this Lease but otherwise upon the same terms and conditions as are herein contained with the exception of this right of renewal.

**20. ESSENTIAL TERMS, RE-ENTRY, BREACH, DAMAGES**

**20.1 Essential Terms**

The clauses of this Lease referred to in Item 10 of Schedule 1 are essential terms of this Lease and the Landlord may at its option treat any breach or default by the Tenant in the observance or performance of its obligations under any of such clauses as a repudiation by the Tenant of this Lease.

**20.2 Power of Re-entry**

If:

- (a) the rent or any part of it is unpaid for fourteen (14) days after any of the days on which it should have been paid (although no formal or legal demand may have been made for payment); or
- (b) the Tenant commits or permits to occur any other breach or default in the due and punctual observance and performance of any of the terms of this Lease and fails to remedy the breach within a period of fourteen (14) days of written notice from Landlord (or such shorter time as the Landlord may in any particular case reasonably stipulate);
- (c) any Tenant's Property in or on the Premises is seized or taken in execution under any judgment or other proceedings;
- (d) the Tenant ceases to be able to pay its debts as they become due;
- (e) any step is taken to enter into any arrangement between the Tenant and its creditors;
- (f) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a liquidator, a provisional liquidator, an administrator or other like person of the whole or

any part of the Tenant's assets or business; or

(g) the Tenant is deregistered or dissolved or any step is taken by any person towards that, then the Landlord or the Landlord's attorney or duly authorised agent, solicitor or representative may without notice to the Tenant re-enter into and upon the Premises or any part thereof in the name of the whole and use and enforce all such ways and means and adopt all such measures as may be necessary or expedient for the purpose of effecting such re-entry by force or otherwise as the occasion may require without being liable for any loss expense damage action suit or proceeding or cost and to hold and enjoy the Premises as if these presents had not been made and thereupon the Tenant's leasehold interest in the Premises will cease and determine.

### 20.3 Damages generally

The Landlord's entitlement to recover losses, damages, costs or expenses will not be affected or limited by:

- (a) the Tenant abandoning or vacating the Premises;
- (b) the Landlord re-entering the Premises or terminating the Tenant's leasehold interest in the Premises;
- (c) the Landlord accepting the Tenant's repudiation; or
- (d) conduct of the parties which may constitute a surrender by operation of law.

## 21. NOTICES

21.1 Any written notice to be given by one party to the other shall be signed by the party giving the notice or by an officer or the duly authorised solicitor or agent of that party. Notice may be given to a party:

- (a) personally
- (b) by leaving it at the party's address last notified;
- (c) by sending it by pre-paid mail to the party's postal address last notified; or
- (d) by sending it by email to the party's email address last notified.

21.2 Notice is deemed received by a party:

- (a) if hand delivered, on the date of delivery; or
- (b) if sent by prepaid post within Australia, on the fourth Business Day after posting;
- (c) if sent by email:
  - A. at the time shown in the delivery confirmation report generated by the sender's email system; or
  - B. if the sender's email system does not generate a delivery confirmation report within twelve (12) hours of the time the email is sent, unless the sender receives a return e-mail notification that the email was not delivered, undeliverable or similar, at the time which is twelve (12) hours from the time the email was sent.

21.3 However, if the notice is deemed to be received on a day which is not a Business Day or after 5pm, it is deemed to be received at 9am on the next Business Day.

21.4 When two or more people comprise a party, notice to one is effective notice to all.

21.5 Each party hereby notifies the other party that its addresses for notice as at the date of this document are as set out in the respective party details in Schedule 1.

## 22. COSTS

22.1 Each party will bear its own costs in respect of the preparation, negotiation, execution and stamping of this Lease.



22.2 The Tenant must pay all stamp duty and registration fees in respect of this Lease and any renewal, extension, surrender, assignment or transfer of this Lease and any other incidental documents including any lease plan costs.

## 23. MISCELLANEOUS

### 23.1 Holding Over

If the Tenant continues in occupation of the Premises after the expiration of the Term with the consent of the Landlord the Tenant will thereupon become or be deemed to be a monthly tenant of the Landlord at a rent determined in accordance with the provisions of this Lease, and such tenancy will be subject to such of the conditions and covenants contained in this Lease as are applicable to a monthly tenancy.

### 23.2 Waiver

No waiver by the Landlord of any breach or non-observance by the Tenant of any covenant herein contained shall constitute a general waiver of the obligations of the Tenant.

### 23.3 Acceptance of Rent Arrears

In respect of the Tenant's obligations to pay rent the acceptance by the Landlord of arrears of or any late payment of rent will not constitute a waiver of the essentiality of the Tenant's obligations to pay rent on the dates hereinbefore set out for payment of rental or in respect of the Tenant's continuing obligation to pay rent during the Term.

### 23.4 Kiosks and Marquee

- (a) The Landlord may erect from time to time during the term and remove and re-erect kiosks, marquees and other temporary or permanent structures in any part of the Land (not comprising the Premises) and may grant to any person the exclusive use of all or any part thereof for such purposes for such periods and upon such terms and conditions as the Landlord may in its absolute discretion think fit.
- (b) The Tenant may request the consent of the Landlord to erect a marquee on the Premises for a particular day or days, where a sporting game or match will be held. If the Landlord's consent is granted, such consent will be subject to certain conditions and requirements of the Landlord from time to time. Such conditions will include an obligation on the Tenant to ensure that such marquee is weighted to prevent damage to sub-surface irrigation.

### 23.5 No Caveat

The Tenant must not lodge or cause or permit to be lodged any absolute caveat over the certificate of title for the Land or the Premises.

### 23.6 Landlord and Tenant Act

A notice under section 10 of the *Landlord and Tenant Act 1936* (SA) must allow fourteen (14) days for the Tenant to remedy a breach of this Lease if it is capable of remedy and to make reasonable compensation in money to the satisfaction of the Landlord. No period of notice is required in respect of non-payment of rent.

### 23.7 Power of Attorney

If the Landlord becomes entitled to terminate this Lease and re-enter and take possession of the Premises (a statutory declaration of any duly authorised officer, employee or agent of the Landlord will be conclusive evidence for the purpose of the Registrar-General) then the Tenant irrevocably appoints the Landlord as the attorney of the Tenant to execute any documents and perform any acts the Landlord requires to give full effect to the power of re-entry under the *Real Property Act 1886* (SA). The Tenant must execute any documents and perform any acts the Landlord requires to give full effect to the power of re-entry under the *Real Property Act 1886* (SA).

## 23.8 Special Conditions

This Lease is subject to the special terms and conditions (if any) specified in **Error! Reference source not found.** of Schedule 1 and if there is any inconsistency between any such special terms and conditions and any of the provisions of this Lease then such special terms and conditions will prevail.

## Schedule 1

- Item 1 Tenant** (clause 1.17)  
Name: Carly Emma Ball T/As New Body Loading PT  
ABN: 16 513 749 244  
Address: 261 Main Road, Blackwood SA 5051  
Email: [contact@newbodyloading.com.au](mailto:contact@newbodyloading.com.au)
- Item 2 Premises** (clause 1.12)  
That portion of the land comprised in Certificate of Title Volume 6184 Folio 142 as delineated in red on the plan contained in Annexure 3 and more particularly being portion of the Kauri Community and Sports Centre situate at Lipson Avenue Seacliff SA 5049
- Item 3 Land** (clause 1.8)  
The whole of the land comprised in Certificate of Title Volume 6184 Folio 142
- Item 4 Permitted Use** (clause 10.1)  
The provision of personal training and fitness related activities
- Item 5 Term** (clause 1.21)  
A term of one (1) year commencing on 1 February 2025 (**Commencement Date**) and expiring at 11.59PM on 31 January 2026
- Item 6 Commencing Rent** (clause 3)  
\$5,175 per annum plus GST
- Item 7 Rent Review** (clause 3)  
Dates: Anniversary of the commencement, if holding over.  
Method: As at and from each review date specified above, there shall be a CPI Rent Review.
- Item 8 Public Risk Insurance** (clause 12)  
**TWENTY MILLION DOLLARS** per claim and unlimited in the annual aggregate or such higher amount as the Landlord may from time to time reasonably require.
- Item 9 Extension Of Term** (clause 19)  
Nil
- Item 10 Essential Terms** (clause 20)  
Clauses 3.1, 4, 5, 6, 7, 8, 10.1, 11, 12, 13, 17 and 23.83.1, 4, 5, 6, 7, 8, 9.1, 9.3, 10, 11, 12, 17, 22.8 and any obligations imposed on the Tenant pursuant to Item 10 of this Schedule.
1. **Child Safe Environment**
    - 1.1 The Tenant acknowledges that the City of Holdfast Bay is committed to providing a child safe environment (as defined by the *Children and Young People (Safety) Act 2017* (SA)) at all times. A child safe environment is 'an environment, which is both child-safe and child-friendly, where children are valued and feel respected and encouraged to reach their full potential.'
    - 1.2 The Tenant represents to the Landlord that it has fulfilled and will ensure that it

continues to fulfil its requirements under the *Children and Young People (Safety) Act 2017 (SA)* in relation to occupying the Premises for the Permitted Use.

- 1.3 The Tenant must act in the best interests of the community at large.
- 1.4 The Tenant must at the request of the Landlord provide a current police clearance or the relevant criminal history screening certificate under relevant legislation for the Tenant or any of the Tenant's officers, volunteers, members, employees, contractors, tenants and agents who provide services from the Premises.
- 1.5 If the Landlord makes a request of the Tenant under this special condition, the Tenant must provide the requested documents to the Landlord within ten (10) Business Days of such request. Failure to do so will be considered a breach of an essential term of this Lease.

2. **Clean and Tidy**

The Tenant must leave the Premises and the Common Areas in a clean and tidy state at the end of each use.

3. **Fitout**

The Tenant acknowledges they are responsible for fitting out, maintaining and replacing anything within the premises for which they have exclusive use of.

4. **Liquor Licence**

4.1 The Tenant must not serve, sell or provide to persons or consume or allow persons to consume alcoholic beverages on the Premises unless it has first obtained both the Landlord's written consent AND any liquor licence(s) required by the *Liquor Licensing Act 1997 (SA)* (**Liquor Act**).

4.2 If the Tenant obtains a licence (or licences) as permitted by this special condition, the Tenant acknowledges and agrees the such liquor licence must only permit the sale, service or consumption of alcohol on the days and during the times as follows:

Sunday to Friday (inclusive) 9:00 am to 12:00 am

Saturday 9:00 am to 1:00 am

4.3 The Tenant further acknowledges and agrees that the Tenant:

- (a) will not do or omit to do or allow to be done or omitted to be done any act whereby any licence issued under the Liquor Act in respect of the Premises or of any business conducted thereon may be liable to be suspended, forfeited or removed from the Premises or in any way prejudicially affected or whereby any offence is committed under the Liquor Act;
- (b) will at the Tenant's own cost at all times during the term of this Lease comply with all of the requirements of the Liquor Act and every order and requirement relating to the Premises made or imposed by the Licensing Authority. In default thereof, it shall be lawful for but not obligatory upon the Landlord to enter the Premises and to comply with, observe, carry out and perform such order or requirement. All costs incurred by the Landlord in so doing shall be repaid by the Tenant to the Landlord upon demand. Any work carried out by the Tenant pursuant to any such order or requirement shall be carried out to the reasonable satisfaction of the Landlord and the Landlord's architect provided that the Tenant shall not be responsible for any structural works except if such works are required due to any act, neglect or omission of the Tenant or the Tenant's use of the Premises;
- (c) will renew any licence issued in respect of the Premises as and when required from time to time;

- (d) will not transfer any licence issued under the Liquor Act in respect of the Premises without the prior written consent of the Landlord;
- (e) will during the term of this Lease supply to the Landlord within seven (7) days after forwarding the same to the Licensing Authority a copy of every form, letter or application required to be lodged with the Licensing Authority pursuant to the Liquor Act; and
- (f) if the Tenant receives any summons, complaint or other legal process or any notice or communication from any person or authority relating to the Premises or to any licence issued in respect thereof, the Tenant shall immediately provide to the Landlord all necessary particulars of such notice or communication and all relevant circumstances and events. The Tenant will not consent to any matter referred to in any such communication nor take any action in relation thereto without first obtaining the written consent of the Landlord.

**5. Tenant's Fixtures and Fittings**

- 5.1 For the avoidance of doubt, the Tenant acknowledges that the Landlord has no liability or responsibility for any fixtures, fittings and/or other items installed, owned or otherwise brought onto the Premises by the Tenant.
- 5.2 At the expiration or earlier determination of the this Lease, if requested in writing by the Landlord, the Tenant must, in consideration for \$1.00 (if demanded) transfer ownership to the Landlord all such fixtures and fittings within the Premises, free of any other interests, which are nominated by the Landlord pursuant to this special condition.

**6. Council Rebate**

The parties acknowledge that there is no automatic right to a council rate rebate levied on the Premises. The Tenant has an opportunity to request the Landlord to apply a rebate of the rates levied on the Premises by lodging an application with the Landlord in accordance with the Landlord's prescribed form by no later than 15 May each year during the Term of this Lease. The prescribed form can be requested from the Landlord during April in each calendar year.

## SCHEDULE 2 Maintenance Schedule

1. This schedule outlines specific responsibilities of Landlord and the Tenant, where applicable, and must be read in conjunction with relevant provisions within this Lease including but not limited to **clauses 6 and 14**. This schedule is not an exhaustive list and the obligations on the parties are not limited to the items below, rather they form part of the maintenance, repair and replacement obligations outlined in clause 6.
2. For the absence of doubt, the Tenant acknowledges and agrees that it is responsible, at its own cost and expense, to keep the Premises clean, free from damage and misuse and in the same condition as it was as at the commencement date of this Lease (fair wear and tear excepted). As outlined in clause 6 of this Lease, but not expressly stated below, this obligation extends to making good (to the Landlord's satisfaction, acting reasonably) any damage to the Premises howsoever caused or contributed to by the Tenant or any of the Tenant's members, servants, agents, Tenants or invitees.
3. The Landlord is responsible for structural and capital repairs, maintenance and replacement except to the extent that such repairs, replacement and costs are required as a result of the act, omission or negligence of the Tenant or any of the Tenant's members, servants, agents, Tenants or invitees.
4. To the extent of any inconsistency with this Maintenance Schedule and the main provisions of this Lease, this Maintenance Schedule will prevail.
5. In this Schedule 2:
  - (a) *all references to "end of life" must be interpreted as being the period over which an asset is expected to be available for use by the Tenant if properly maintained and repaired in good order, or the asset has fully depreciated such that it has no economic life;*
  - (b) *all references to "periodically" must be interpreted to any program or time frame stated within any manufacturing specifications, Australian Standards or industry best practice benchmarking, as notified by the Landlord to the Tenant from time to time; and*
  - (c) *The Landlord's responsibility is limited to the extent that such repairs, maintenance or replacement is required as a result either directly or indirectly of the act, omission or negligence of the Tenant or its members, agents, servants, Tenants or invitees.*

## Leased Area – Internal Building

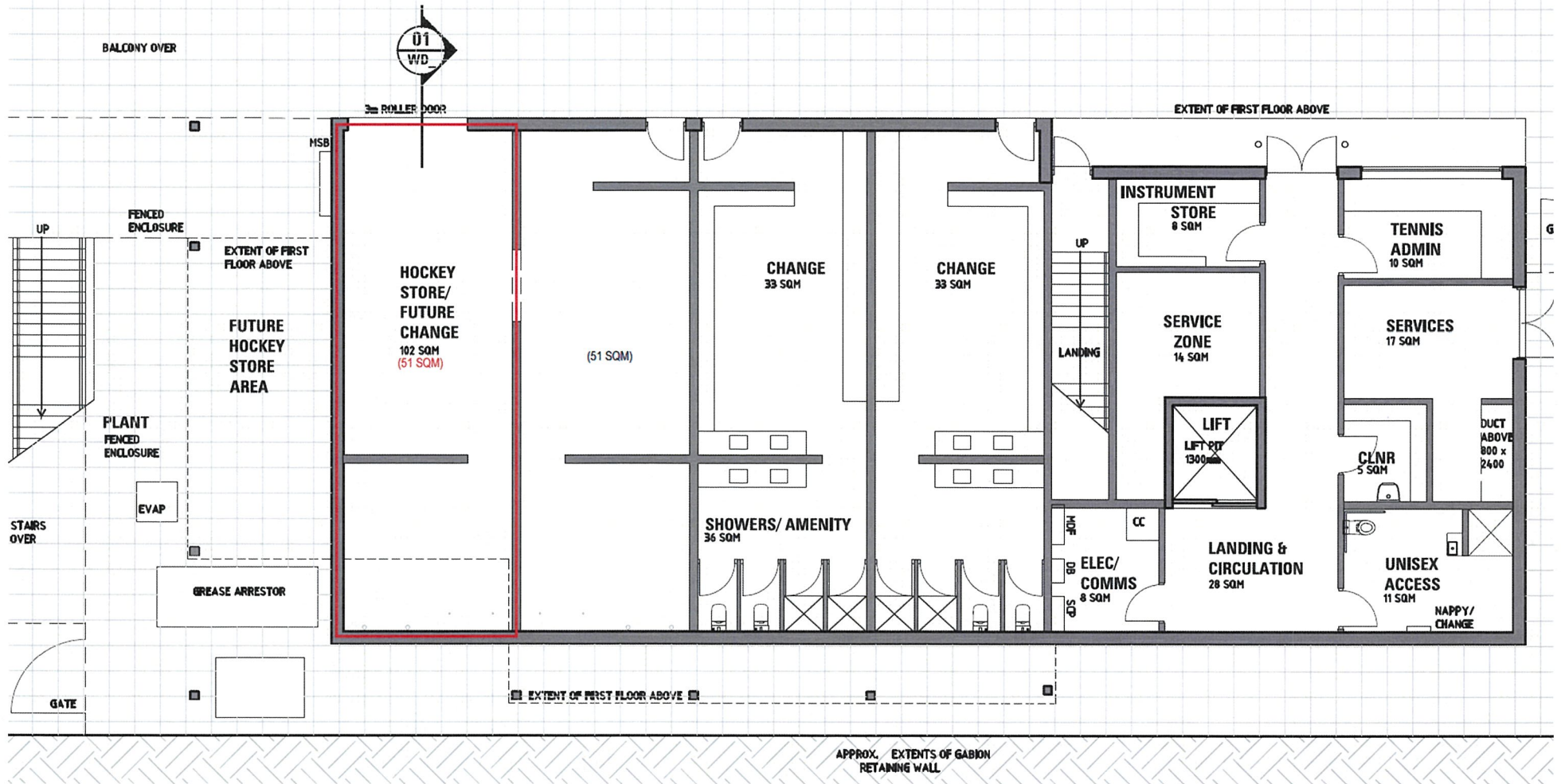
Item	Tenant's responsibility		Frequency	Landlord's responsibility
	Organised and paid by Tenant	Organised by Landlord AND on charged to Tenant		
Tenancy cleaning	Full responsibility of tenant		Periodically	
Rubbish removal	Tenant responsible for cost of removing rubbish from site	May choose to provide communal waste collection service, recharging each Tenant for their proportion.	Weekly (collected) Daily (placed in bins)	
Pest control	Tenant responsibility		Periodically	
Water/sewer/gas piping and fittings, hot water systems	If choosing to fitout tenancy to include plumbing services, full responsibility of maintenance, repairs and end of life.		As required	
Security Alarm System (System owned and managed by council)	Turn on/off, ensuring building is not left unarmed or triggering false alarms.	Call outs or attendance by security patrols caused by the Tenant and their activities.	As required	Configuration of the systems, servicing, maintenance and monitoring. Replace at end of life.
Fire services including extinguishers, hose reels, fire blankets, sprinkler systems	Make sure fire equipment is accessible and unobstructed. Report any damage to Landlord.	Repair, replace or replenish is used or damaged by Tenant.	Periodically	Service, maintain and replace fire extinguishers and blankets, hose reels and sprinkler systems at end of life unless damage caused by Tenant.
Emergency exit lighting and evacuation signage	Do not obstruct. Report any failures or damage to Landlord as soon as possible.	Making good any damage caused by Tenant.	Periodically	Full responsibility

Smoke detectors	Report any failures or damage to Landlord as soon as reasonably practicable	Call outs or attendance by MFS caused by the Tenant and their activities.  Any approved changes to the system or its configuration that are requested by the Tenant	Periodically	Configuration of the system, servicing, maintenance and monitoring. Replacement at end of life
Telecommunications	Full responsibility		As required	Nil responsibility
Entry doors, locking mechanisms	Do not obstruct and keep clean , free of damage and in the same condition as at the commencement date of the licence (fair wear and tear excepted)	Card/key replacement.	As required	Service, repair, and replace at end of life.
Lighting fixtures	Globe replacement and repairs. End of life if installed by Tenant.		As required	Replace at end of life, if installed by Lessor.
Flooring (all types)	Full responsibility.		As required	Nil responsibility
Air conditioning units/thermostats, ducting etc	Keep clean, free of damage and obstruction.	Regular service and repairs to maintain working order (including maintenance contract with third party)	In line with manufacturer's specification	Regular service and repairs of ventilation system, end of life. No obligation to provide heating and cooling.
Electrical services, sub switchboards, distribution boards and power lighting circuits	Keep free of damage and in same condition as at the commencement date of the Licence (fair wear and tear excepted)		As required	Full responsibility



Electrical Tagging and Testing (Tenant equipment)	Full responsibility. Provide certificate to Landlord.		Annually	Nil responsibility
Internal walls and screens	Keep clean, free from damage and in same condition as at the commencement date of the Licence (fair wear and tear excepted).  Touch up painting when required.		Periodically	Responsibility for structural maintenance and replace at end of life, for walls installed by Landlord only.
Tenant's fixtures, fittings and loose / soft furniture and equipment	Full maintenance and responsibility		As required	Nil responsibility except to the extent damage caused by act or negligence of Landlord
Window Coverings (curtains, blinds, shutters, etc)	Full responsibility, including replace at end of life		As required	Nil responsibility
Plate Glass	If Tenant liable, make good damage caused or contributed to by Tenant or their customers.		As required	Landlord to repair and reinstate if liable. Replace at end of life.

# Schedule 3 Plan of Premises



## RULES AND REGULATIONS

1. The Tenant must not:
  - 1.1 smoke in the Building or on the areas outside the Building on the Land;
  - 1.2 put up signs, notices, advertisements, blinds or awnings, antennae or receiving dishes or install vending or amusement machines without the Landlord's approval;
  - 1.3 hold auction, bankrupt or fire sales in the Premises;
  - 1.4 keep an animal or bird on the Premises;
  - 1.5 use a business name which includes words connecting the business name with the Building without the Landlord's approval;
  - 1.6 remove floor coverings from where they were originally laid in the Premises without the Landlord's approval;
  - 1.7 do anything to the floor coverings in the Building which affects any guarantee in connection with them if the Landlord has given the Tenant a notice setting out the relevant terms of the guarantee;
  - 1.8 use any method of heating, cooling or lighting the Premises other than those provided or approved by the Landlord;
  - 1.9 operate a musical instrument, radio, television or other equipment that can be heard outside the Premises;
  - 1.10 throw anything out of any part of the Building;
  - 1.11 move heavy or bulky objects through the Building without the Landlord's approval;
  - 1.12 obstruct:
    - (a) windows in the Premises except by internal blinds or curtains approved by the Landlord;
    - (b) any air vents, air conditioning ducts or skylights in the Premises; or
    - (c) emergency exits from the Building or the Premises; or
    - (d) the Common Areas; or
    - (e) interfere with directory boards provided by the Landlord.
2. The Tenant must:
  - 2.1 put up signs in the Premises prohibiting smoking if required by the Landlord;
  - 2.2 if the Landlord approves the Tenant's use of a business name which is connected with the Building, terminate any right it has to use that business name on the date it must vacate the Premises;
  - 2.3 participate in any emergency drill of which the Landlord gives reasonable notice;
  - 2.4 evacuate the Building immediately and in accordance with the Landlord's directions when informed of any actual or suspected emergency; and
  - 2.5 secure the Premises when they are unoccupied and comply with the Landlord's directions about Building security.

IMPORTANT NOTICE

EXCLUSION OF WARRANTY OF FITNESS FOR PURPOSE

THE LANDLORD DOES NOT WARRANT THAT THE PREMISES YOU ARE ABOUT TO LEASE WILL, FOR THE DURATION OF YOUR LEASE, BE STRUCTURALLY SUITABLE FOR THE TYPE OF BUSINESS THAT YOU INTEND TO CARRY ON.

SIGNED as an agreement

DATED

THE COMMON SEAL of  
CITY OF HOLDFAST BAY  
was hereunto affixed in the presence of:

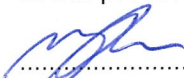
.....  
Signature of Mayor

.....  
Signature of CEO

.....  
Name of Mayor (print)

.....  
Name of CEO (print)

SIGNED by  
CARLY EMMA BALL  
In the presence of:

  
.....  
Signature of witness

  
.....  
Carly Emma Ball

Michael Jenner  
.....  
Name of witness (print)

**Item No:** 15.3

**Subject:** **SOUTHERN REGION WASTE RESOURCE AUTHORITY – CHARTER REVIEW 2025**

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## Summary

The Southern Region Waste Resource Authority (SRWRA) is a regional subsidiary established by the Cities of Onkaparinga, Marion and Holdfast Bay, pursuant to section 43 of the *Local Government Act 1999*.

The SRWRA Charter is required to be reviewed every four years or earlier if an update is necessary. Any amendment to the Charter requires unanimous agreement of the constituent Councils via resolution. The Charter was last reviewed on 6 June 2024.

This report seeks Council's approval of a proposed amendment to the SRWRA Charter 2024, clause 4.2.

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## Recommendation

**That Council approves the Southern Region Waste Resource Authority Charter 2024 amendment to increase the Board size to up to nine members, which includes up to three independent members.**

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## Background

The Southern Region Waste Resource Authority (SRWRA) is a regional subsidiary established by the Cities of Onkaparinga, Marion and Holdfast Bay, pursuant to section 43 of the *Local Government Act 1999*. Under its Charter, SRWRA is responsible for providing and operating waste management services on behalf of its Constituent Councils.

While the SRWRA Charter (the Charter) is required to be reviewed at least once in every four years it may be reviewed by the Constituent Councils at any time. The Charter was last reviewed on 6 June 2024.

*Refer Attachment 1*

## Report

On 3 March 2025, the Chief Executive Officer received correspondence from SRWRA proposing an amendment to their Charter 2024.

*Refer Attachment 2*

The SRWRA Board has recently reviewed the Charter 2024 and recommends the Constituent Councils consider several changes to clause 4.2 Membership of the Board.

The key change recommended by the Board is to increase the number of Board members from eight to nine, with the additional person being an independent member. The proposed amendment is intended to improve Board succession planning and to acknowledge that an appropriate mix of skills is important for the effective operation of the Board. Further rationale for this change is outlined in the letter provided in Attachment 2.

Following approval from all Constituent Councils:

1. A copy of the Charter is provided, as amended, to the Minister.
2. A copy of the Charter, as amended, will be published on the SRWRA website.
3. Publishing a notice of Charter amendment and the website address at which the Charter is available for inspection in the Government Gazette.

## **Budget**

The appointment of a second independent member will be funded from within the SRWRA annual budget, with the fee to be determined by the SRWRA Board.

## **Life Cycle Costs**

Not applicable

## **Strategic Plan**

Our Holdfast 2050+ - A city, economy and community that is resilient and sustainable

## **Council Policy**

Not applicable

## **Statutory Provisions**

*Local Government Act 1999, section 43*

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**Written By:** Executive Assistant to the Chief Executive Officer

**Chief Executive Officer:** Ms P Jackson

# Attachment 1

SOUTHERN REGION WASTE RESOURCE AUTHORITY  
REGIONAL SUBSIDIARY  
LOCAL GOVERNMENT ACT 1999  
*Charter 2024*

**PART I: GENERAL**

**1. INTRODUCTION**

1.1 *Name*

The name of the subsidiary is Southern Region Waste Resource Authority (referred to as '*the Authority*' in this Charter).

1.2 *Definitions*

- 1.2.1 **absolute majority** means a majority of the whole number of the Board members or of the Constituent Councils as the case may be;
- 1.2.2 **Act** means the *Local Government Act 1999*;
- 1.2.3 **Board** means the board of management of the Authority;
- 1.2.4 **Budget** means a budget consistent with Clause 6.5 and last adopted by the Board
- 1.2.5 **Constituent Councils** means the Councils identified at Clause 2.1 of this Charter;
- 1.2.6 **Gazette** means the *South Australian Government Gazette*;
- 1.2.7 **net assets** means total assets (current and non-current) less total liabilities (current and non-current) as reported in the annual audited financial statements of the Authority together with the net present value of the projected future cash inflows net of cash outflows of the remaining useable airspace over the SRWRA Landfill Operation as licensed by the Environment Protection Authority;
- 1.2.8 **simple majority** means a majority of those present and entitled to vote;
- 1.2.9 **SRWRA Landfill Operation** means that land which is held by the Authority under certificates of title volume 5822, folio 967; volume 5822, folio 966; volume 5822, folio 965; volume 5299, folio 719; volume 5299, folio 720; volume 6199, folio 621 and volume 6217, folio 132;
- 1.2.10 **waste** means any or all waste as approved under the Environment Protection Act licence held by the Authority or its contractor.

**PART II: GOVERNANCE**

**2. THE AUTHORITY**

2.1 *Establishment and Charter*

2.1.1 The Authority is a regional subsidiary established pursuant to Section 43 of and Schedule 2 to the Act by the:

- 2.1.1.1 City of Holdfast Bay;
- 2.1.1.2 City of Marion; and
- 2.1.1.3 City of Onkaparinga.

2.1.2 This Charter may be amended at any time by unanimous decision (expressed by resolution) of the Constituent Councils.

2.1.3 Before the Constituent Councils vote on a proposal to alter this Charter, they must take into account any recommendations of the Board.

2.1.4 For the purposes of Clause 19(5)(b) of Schedule 2 to the Act, the Chief Executive Officers of the Constituent Councils have determined that a copy of the Charter, must be published on the website of the Authority.

2.1.5 This Charter must be read in conjunction with Parts 2 and 3 of Schedule 2 to the Act. The Authority shall conduct its affairs in accordance with Schedule 2 to the Act except as modified by this Charter in a manner permitted by Schedule 2.

2.2 *Objects and Purposes*

2.2.1 The Authority is established to:

- 2.2.1.1 provide and operate services at a place or places for the management of waste by or on behalf of the Constituent Councils and/or any other approved councils;
- 2.2.1.2 undertake anything relevant (including educational programmes and processes) to the management of waste;
- 2.2.1.3 provide a forum for discussion and/or research for the ongoing improvement of management of waste;
- 2.2.1.4 undertake management of waste on behalf of the Constituent Councils on a competitive basis;
- 2.2.1.5 fulfil, on behalf of the Constituent Councils, any ongoing obligation in relation to rehabilitation and monitoring of waste management facilities under its control;
- 2.2.1.6 secure best value and value for money in waste management activities and services;
- 2.2.1.7 develop or facilitate activities or enterprises that result in a beneficial use of waste;
- 2.2.1.8 be financially self-sufficient;
- 2.2.1.9 develop or facilitate activities or enterprises that result in a beneficial use of the landfill site or infrastructure;
- 2.2.1.10 keep the Constituent Councils informed about relevant emerging opportunities, trends or issues in waste management; and
- 2.2.1.11 have regard in the performance of its functions to sustainable, environmentally efficient practices with regard to waste management

2.2.2 The Authority must in the performance of its role and functions and in all of its plans, policies and activities:

- 2.2.2.1 operate in a sustainable manner by giving due weight to economic, social and environmental considerations; and
- 2.2.2.2 conduct its activities in compliance with all regulatory requirements and in a manner that minimises risk to the Constituent Councils.



2.3 *Powers and Functions of the Authority*

Subject to this Charter, the Authority may exercise the following powers in the performance or discharge of its objects and purposes:

- 2.3.1 the accumulation of surplus funds including for investment purposes;
- 2.3.2 investing any of the funds of the Authority in any investment authorised by the *Trustee Act 1936*, or with the Local Government Finance Authority provided that:
  - 2.3.2.1 in exercising this power to invest the Authority must exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons; and
  - 2.3.2.2 the Authority must avoid investments that are speculative or hazardous in nature;
- 2.3.3 setting aside a reserve fund or funds clearly identified for the upkeep and/or replacement of fixed assets of the Authority or meeting any deferred liability of the Authority;
- 2.3.4 borrowing money and/or to incurring expenditure in accordance with Clause 6.2 of this Charter;
- 2.3.5 opening and operating bank accounts;
- 2.3.6 entering into contracts, purchasing, selling, leasing, hiring, renting or otherwise acquiring or disposing of any personal property or interests therein;
- 2.3.7 purchasing, selling, leasing, hiring, renting or otherwise acquiring or disposing of any real property or interests therein, provided that it is a condition precedent, that in any such transaction where the Authority will incur a singular or a total liability of \$1,000,000 or more that unless the liability is included in the Budget; the prior written approval of two-thirds of the Constituent Councils is obtained;
- 2.3.8 participating in a joint venture, trust, partnership or similar for the purpose of engaging in a commercial activity or enterprise;
- 2.3.9 appointing, managing, suspending and dismissing the Chief Executive Officer of the Authority;
- 2.3.10 engaging retaining, and dispensing with the services of professional advisers to the Authority;
- 2.3.11 charging whatever fees, the Authority considers appropriate for services rendered to any person, body or Council;
- 2.3.12 making any election for the purpose of any tax or statutory charge;
- 2.3.13 determining the types of waste which shall be received and the method of collection, treatment, recycling and disposal of that waste;
- 2.3.14 undertaking all manner of things relating and incidental to the collection, treatment, recycling and disposal of waste;
- 2.3.15 pursuing the concept of co-operative regionalism in the collection, treatment, recycling and disposal of waste for which the Constituent Councils are or may become responsible
- 2.3.16 causing all waste collected by the Authority to be treated, recycled and disposed of in a sanitary and environmentally acceptable way;
- 2.3.17 providing a forum for the discussion and consideration of topics related to the Constituent Councils' obligations and responsibilities in respect of waste;
- 2.3.18 adopting and using a trading name provided that the Authority shall first register the trading name with the Australian Securities and Investment Commission;
- 2.3.19 commencing legal proceedings provided that any legal proceedings seeking urgent relief be the subject of an urgent report to the Constituent Councils by the Chief Executive Officer;
- 2.3.20 without limiting the Authority's powers and functions, making submissions to and negotiating with the Federal Government, State Government and other sources of grant funding in relation to the provision and receipt of funding for the Authority; and
- 2.3.21 anything else necessary or convenient for or incidental to the exercise, performance or discharge of its powers and functions or the attainment of its objects and purposes.

2.4 *National Competition Policy*

If the Authority engages in any commercial activity or enterprise which constitutes a significant business activity of the Authority, it will, where necessary and having regard to a cost/benefit analysis, apply relevant principles of competitive neutrality to that activity.

2.5 *Acting Outside Areas of Constituent Councils*

The Authority may undertake its activities outside the areas of the Constituent Councils in accordance with the Act but only where such activities have been approved by the Constituent Councils as being necessary or expedient to the performance by the Authority of its functions and the activity is included in the annual business plan of the Authority.

2.6 *Delegation by the Authority*

The Authority may delegate any of its powers except those to:

- 2.6.1 impose charges;
- 2.6.2 enter into transactions in excess of \$250,000
- 2.6.3 subject to this Charter, borrow money or obtain any other form of financial accommodation;
- 2.6.4 approve expenditure of money on the works, services or operations of the Authority not set out in the Budget or where required by this Charter, approved by the Constituent Councils;
- 2.6.5 approve the payment of allowances to members of the Board;
- 2.6.6 adopt or revise an annual business plan or Budget or any financial estimates and reports; and
- 2.6.7 make any application or recommendation to the Minister.

2.7 *Committees*

- 2.7.1 The Board may establish a committee comprised of any persons to deal with any matter within the Authority's functions and as detailed in the terms of reference adopted by the Board for the committee.
- 2.7.2 The Board may delegate powers and functions to a committee.

2.7.3 A member of a committee established under this Clause holds office at the pleasure of the Board.

2.7.4 The Chair of the Board is an ex-officio a member of any committee established by the Board.

### 3. CONSTITUENT COUNCILS

#### 3.1 *Withdrawal*

3.1.1 A Constituent Council may not withdraw from the Authority except with the approval of the Minister and subject to the Act and this Charter.

3.1.2 A Constituent Council which intends to withdraw from the Authority shall give to the Board and the other Constituent Councils written notice of such intention, specifying the date of intended withdrawal. The notice shall be a minimum of twenty-four months' notice expiring on 30 June of the relevant financial year.

3.1.3 The withdrawal of any Constituent Council does not extinguish the liability of that Constituent Council for the payment of its contribution towards any actual or contingent deficiency in the net assets of the Authority at the end of the financial year in which such withdrawal occurs.

3.1.4 The withdrawal of any Constituent Council does not extinguish the liability of that Constituent Council to contribute to any loss or liability incurred by the Authority at any time before or after such withdrawal in respect of any act or omission by the Authority prior to such withdrawal. For the avoidance of doubt, any and all costs associated with closure processes (including but not limited to capping and post-closure monitoring and necessary actions) of a waste cell or the landfill site generally is a liability incurred before the withdrawal of a Constituent Council and is, therefore, a continuing liability for the purposes of this Clause.

3.1.5 Payment by or to the withdrawing Constituent Council must be fully paid by 30 June of the financial year following 30 June of the year in which the withdrawal occurs unless there is agreement of alternative payment arrangements made by the Constituent Councils.

#### 3.2 *New Members*

Subject to the provisions of the Act, the Constituent Councils may unanimously agree to admit a new Constituent Council or Councils, to membership of the Authority, with or without conditions.

#### 3.3 *Direction by Constituent Councils*

To be effective, a direction of the Constituent Councils for the purposes of Clause 26 of Schedule 2 to the Act must be evidenced by a minute signed by the Chief Executive Officer of each of the Constituent Councils and provided to the Chief Executive Officer of the Authority, as a true and accurate record of the decision made by the delegate or at the relevant Council meeting.

### 4. BOARD OF MANAGEMENT

The Authority is a body corporate and is governed by the Board, which has the responsibility to manage the business and other affairs of the Authority in accordance with this Charter and any delegations made to it by the Constituent Councils.

#### 4.1 *Functions of the Board*

4.1.1 The formulation of strategic plans and strategies aimed at improving the business of the Authority.

4.1.2 To provide professional input and policy direction to the Authority.

4.1.3 Monitoring, overseeing and measuring the performance of the Chief Executive Officer of the Authority.

4.1.4 Implementing effective risk management policies, practices, procedures and strategies, including by ensuring the protection of assets under the care and control of the Authority.

4.1.5 Ensuring that a code of ethical behaviour and integrity is established and implemented in all business dealing of the Authority.

4.1.6 Developing business plans.

4.1.7 Exercising the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.

4.1.8 Observing all plans, targets, structures, systems and practices required or applied to the Authority by the Constituent Councils.

4.1.9 Ensuring that all information furnished to a Constituent Council is accurate.

4.1.10 Ensuring that the Constituent Councils are advised, as soon as practicable, of any material development that affects the financial or operating capacity of the Authority or gives rise to the expectation that the Authority may not be able to meet its debts as and when they fall due.

#### 4.2 *Membership of the Board*

4.2.1 The Board shall consist of eight members appointed as follows:

4.2.1.1 two persons appointed by each Constituent Council, one of whom must be a senior officer of the Constituent Council making the appointment;

4.2.1.2 two persons appointed jointly by the Constituent Councils who are not members or officers of a Constituent Council but who, in the opinion of the Constituent Councils, have expertise in waste management and/or business. These persons will be chosen from a list of persons circulated to the Constituent Councils and appointed by a panel comprising the Chief Executive Officer (or nominee) and one other person from each Constituent Council nominated by the Chief Executive Officer.

4.2.2 With the exception of the persons appointed pursuant to subclause 4.2.1.2, a Board Member shall, subject to this Charter, be appointed for a term not exceeding the term determined by the Constituent Council and specified in the instrument of appointment and at the expiration of the term of office will be eligible for re-appointment.

4.2.3 The maximum term of service for Board Members appointed pursuant to subclause 4.2.1.2 should not exceed 10 years.

4.2.4 The Constituent Councils may appoint either a specific Deputy for each Board Member appointed pursuant to subclause 4.2.1.1 or one non-specific Deputy for both such Board Members and a second Deputy to that Deputy. In the absence of a Board Member, the specific Deputy or the non-specific Deputy will be deemed to be the Board Member for that time or, where a non-specific Deputy and second Deputy have been appointed and both Board Members are absent then both Deputies will be deemed to be the Board Members for that time, exercising all of the rights and privileges and being subject to all of the obligations and liabilities of the Board Member(s) during the absence of the Board Member(s).

- 4.2.5 The Constituent Councils should give consideration to the skills that may be required for the Board to operate effectively when making Board appointments.
- 4.2.6 In addition to the circumstances provided for under Clause 20(3) of Schedule 2 to the Act, the office of a Board Member will become vacant upon:
- 4.2.6.1 the Constituent Council (or Constituent Councils as the case may be) responsible for appointing the Board Member providing written notice to the Board Member and the Board of the Constituent Council's (or Constituent Councils') decision to remove the Board Member from office. The Board Members appointed under subclause 4.2.1.2, can only be removed from office by a unanimous decision of the Constituent Councils; or
- 4.2.6.2 if the Board Member is an elected member or officer of a Constituent Council, upon ceasing to be either an elected member of or an employee of the Constituent Council as the case may be; or
- 4.2.6.3 if the Board Member has been appointed pursuant to subclause 4.2.1.1, upon the Constituent Council withdrawing from the Authority.
- 4.2.7 The Board may by a two-thirds majority vote of the Board Members present (excluding the Board Member subject to this subclause 4.2.7) make a recommendation to the relevant Constituent Council requesting the Constituent Council to terminate the appointment of a Board Member that it has appointed under subclause 4.2.1.1 or, to all of the Constituent Councils to terminate the appointment of a Board Member appointed under subclause 4.2.1.2 for:
- 4.2.7.1 any behaviour of the Board Member which, in the opinion of the Board, amounts to impropriety and includes, but is not limited to, a breach of the Member's obligations under the Act;
- 4.2.7.2 serious neglect of duty in attending to his/her responsibilities as a Board Member;
- 4.2.7.3 breach of fiduciary duty to the Authority;
- 4.2.7.4 breach of the duty of confidentiality to the Authority; or
- 4.2.7.5 any other behaviour which, in the opinion of the Board, may discredit the Authority.
- 4.2.8 If any casual vacancy occurs in the membership of the Board it will be filled in the same manner as the original appointment for the balance of the term of the original appointment.
- 4.2.9 The Board Member appointed pursuant to subclause 4.2.1.2 shall be eligible for an allowance from the funds of the Authority as the Board shall determine from time to time.
- 4.3 *Propriety of Members of the Board*
- 4.3.1 Whilst all Board Members must comply with their statutory obligations under the Act, only the Board Members appointed pursuant to subclause 4.2.1.2 are required to comply with Division 2, Part 4 (Register of Interests) of Chapter 5 of the Act.
- 4.4 *Chair of the Board*
- 4.4.1 The Chair of the Board shall be a person appointed pursuant to subclause 4.2.1.2 and shall hold office for a term of three years, unless he/she resigns, is removed from office pursuant to subclause 4.2.6 or, is otherwise no longer eligible to act as a Board Member.
- 4.4.2 Subject to Clause 4.2.3, the Chair is eligible for re-appointment at the expiration of the term of office. The decision regarding re-appointment is made by the panel formed pursuant to subclause 4.2.1.2.
- 4.4.3 The Board will choose a person appointed pursuant to subclause 4.2.1.1 or 4.2.1.2 to be the Deputy Chair of the Board for a term determined by the Board.
- 4.4.4 In the event of the Chair being absent from a meeting, the Deputy Chair shall preside and in the event of both the Chair and the Deputy Chair being absent from a meeting, the Board Members present shall appoint a person from amongst themselves to chair the meeting.
- 4.4.5 In the event that the Chair either resigns or is no longer eligible to act as a Board Member prior to the expiration of their term, the Deputy Chair shall hold office until a further appointment is made pursuant to subclause 4.2.1.2 whereupon the person so appointed will hold office for the duration of the original appointment. The Deputy Chair is not entitled to any allowance that is paid to the Chair whilst acting in the office of the Chair.
- 4.5 *Meetings of the Board*
- 4.5.1 Subject to the requirements of Schedule 2 to the Act, this Charter and any direction of the Constituent Councils, the Board must determine its own meeting procedures for the proceedings and conduct of all Board meetings and set them out in a Code of Practice for Meetings which shall be reviewed every two years.
- 4.5.2 Ordinary meetings of the Board must take place at such times and places as may be fixed by the Board or the Chief Executive Officer of the Authority from time to time. There shall be at least six ordinary meeting of the Board held in each financial year. Meetings shall not be held before 5 p.m. unless the Board resolves otherwise by resolution supported unanimously by all of the Board Members present at the meeting which determines the issue.
- 4.5.3 An ordinary meeting of the Board will constitute an ordinary meeting of the Authority.
- 4.5.4 Notice of ordinary meetings of the Board must be given by the Chief Executive Officer to each Board Member in the same manner as notice is given by a Chief Executive Officer of a council for an ordinary meeting of a council and for these purposes Section 83 of the Act extends to the Authority as if it were a council.
- 4.5.5 Any Constituent Council or Board Member may by delivering a written request to the Chief Executive Officer of the Authority require a special meeting of the Board to be held. The request will only be valid if it is accompanied by the agenda for the special meeting. On receipt of the request the Chief Executive Officer shall send a notice of the special meeting to all Board Members at least 24 hours prior to the commencement of the special meeting. Such notice shall comply with subclauses 4.5.7 and 4.5.9 of this Charter.
- 4.5.6 The quorum for a meeting of the Board is one-half of the members in office, ignoring any fraction plus one.
- 4.5.7 Each Board Member present at a Board Meeting, excluding the Chairperson, is entitled to vote on a matter. All matters for decision at a meeting of the Board will be decided by a simple majority of votes of the Board Members present and entitled to vote on the matter except where this Charter provides otherwise. In the event that the votes are equal the Chairperson may exercise a casting vote.

- 4.5.8 Subject to complying with their statutory obligations, all Board Members present at a meeting shall vote.
- 4.5.9 Chapter 6, Part 3 of the Act does not apply to the Authority. Meetings of the Board will not be open to the public unless the Board otherwise resolves.
- 4.5.10 Each Board Member must be supplied with a copy of all minutes of the proceedings of a meeting within five days of the meeting.
- 4.5.11 Prior to the conclusion of each meeting of the Board, the Board must identify which agenda items considered by the Board at that meeting will be the subject of an information report to the Constituent Councils.

### **PART III: BUSINESS & FINANCIAL REQUIREMENTS**

#### **5. STAFF**

- 5.1 The Board must appoint a Chief Executive Officer of the Authority to manage the business of the Authority on terms determined by the Board, acting reasonably. The Chief Executive Officer may be a natural person or a body corporate.
- 5.2 The Chief Executive Officer shall cause records to be kept of the business and financial affairs of the Authority in accordance with this Charter.
- 5.3 In the absence or likely absence of the Chief Executive Officer for any period exceeding two weeks, a suitable person to act in the position of Chief Executive Officer of the Authority must be appointed by the Chief Executive Officer after consultation with the Chair or, in default, by the Chair.
- 5.4 The Chief Executive Officer is responsible for the day to day management of the Authority and will ensure that sound business and human resource management practices are applied in the efficient and effective management of the operations of the Authority.
- 5.5 The functions of the Chief Executive Officer shall be specified in the terms and conditions of appointment and shall include but not be limited to:
  - 5.5.1 attending at all meetings of the Board unless excluded by resolution of the Board;
  - 5.5.2 ensuring that lawful decisions of the Board are implemented in a timely and efficient manner;
  - 5.5.3 providing information to assist the Board to assess the Authority's performance against its Strategic and business plans;
  - 5.5.4 appointing, managing, suspending and dismissing other employees of the Authority;
  - 5.5.5 determining the conditions of employment of employees of the Authority, within budgetary constraints set by the Board;
  - 5.5.6 providing advice and reports to the Board on the exercise and performance of the powers and functions under this Charter or any Act;
  - 5.5.7 ensuring that the Authority is at all times complying with all relevant statutory obligations;
  - 5.5.8 co-ordinating and initiating proposals for consideration of the Board including but not limited to continuing improvement of the operations of the Authority;
  - 5.5.9 ensuring that the assets and resources of the Authority are properly managed and maintained;
  - 5.5.10 ensuring that records required under the Act or any other legislation are properly kept and maintained;
  - 5.5.11 exercising, performing or discharging other powers, functions or duties conferred on the Chief Executive Officer by or under the Act or any other Act, and performing other functions lawfully directed by the Board;
  - 5.5.12 achieving financial outcomes in accordance with adopted plans and the Budget of the Authority;
  - 5.5.13 inviting any person to attend at a meeting of the Board to act in an advisory capacity; and
  - 5.5.14 providing reports to the Constituent Councils in accordance with subclause 4.5.11.
- 5.6 The Chief Executive Officer may delegate or sub-delegate to an employee of the Authority any power or function vested in the Chief Executive Officer or, in the case of a sub-delegation, any power delegated to the office by the Board. A delegation or sub-delegation by Chief Executive Officer may be subject to any conditions or limitations as determined by the Chief Executive Officer.
- 5.7 A written record of all delegations and sub-delegations must be kept by the Chief Executive Officer.
- 5.8 The Chief Executive Officer and any other officer declared by the Board to be subject to this provision is required to comply with Division 2 of Part 4 of Chapter 7 (Register of Interests) of the Act. Section 118 (Inspection of Register) of the Act and Section 119 (Restrictions on disclosure) of the Act will apply in respect of the returns furnished by officers of the Authority.

#### **6. MANAGEMENT**

- 6.1 *Financial Management*
  - 6.1.1 The Authority must ensure that appropriate policies, practices and procedures of internal control are implemented and maintained in order to assist it to carry out its activities in an efficient and orderly manner to achieve its objectives, to ensure adherence to management policies, to safeguard its assets and to secure (as far as possible) the accuracy and reliability of its records.
  - 6.1.2 The Authority must establish and maintain a bank account with such banking facilities and at a bank to be determined by the Board.
  - 6.1.3 Any cheques must be signed by two persons authorised by resolution of the Board. Any payments made by Electronic Funds Transfer must be made in accordance with procedures which have received the prior written approval of the Board.
  - 6.1.4 The Chief Executive Officer must act prudently in the handling of all financial transactions for the Authority and must provide quarterly financial and corporate reports to the Board.
  - 6.1.5 The Authority's books of account are available for inspection by any Board Member or authorised representative of any Constituent Council at any reasonable time on request.
- 6.2 *Borrowings and Expenditure*
  - 6.2.1 The Authority has the power to incur expenditure and/or to borrow money:
    - 6.2.1.1 in accordance with the Budget of the Authority; or
    - 6.2.1.2 pursuant to the provisions of subclauses 2.3.4 and 6.2.4 of this Charter; or

- 6.2.1.3 with the prior approval of two-thirds of the Constituent Councils for amounts which do not exceed 25% of the value of the net assets of the Authority and with the prior approval of all the Constituent Councils for other amounts, which approval must be evidenced by formal resolution of the Councils, or
      - 6.2.1.4 otherwise for genuine emergency or hardship.
    - 6.2.2 For the purpose of exercising the powers at Clause 6.2.1 of this Charter the Authority may borrow money from the Local Government Finance Authority or from a registered bank or financial institution within Australia.
    - 6.2.3 For the purposes of Clause 6.2.2 but subject to this Charter borrowings of the Authority:
      - 6.2.3.1 must not be used for the purpose of funding operational costs; and
      - 6.2.3.2 where the borrowings are undertaken with the prior approval of the Constituent Councils, must be drawn down within a period of twenty-four months from the date of approval.
    - 6.2.4 The Authority may operate an overdraft facility or facilities as required provided that the overdrawn balance must not exceed \$100,000 or the amount set out in the annual business plan, whichever is the greater, without the prior approval of two-thirds of the Constituent Councils.
  - 6.3 *Audit*
    - 6.3.1 The Authority shall appoint an auditor in accordance with the *Local Government (Financial Management) Regulations 2011*, on terms and conditions set by the Board.
  - 6.4 *Strategic Plan*

The Authority shall:

    - 6.4.1 prepare a five-year Strategic Plan linking the core business activities of the Authority to strategic, operational and organisational requirements with supporting financial projections setting out the estimates of revenue and expenditure as necessary for the period; and
    - 6.4.2 review the Strategic Plan annually; and
    - 6.4.3 consult with the Constituent Councils prior to adopting or amending the Strategic Plan.
  - 6.5 *Annual Business Plan and Budget*
    - 6.5.1 The Authority shall, after 31 May but before the end of June in each financial year, prepare and adopt an annual business plan and Budget for the ensuing financial year in accordance with the Act.
    - 6.5.2 The draft annual business plan and the draft Budget must be referred to the Constituent Councils with sufficient time to receive any comments from the Councils for consideration by the Board at the time it is considered by the Board for adoption.
    - 6.5.3 For the purposes of subclause 6.5.2, a Constituent Council may comment in writing to the Chief Executive Officer on the draft annual business plan and draft Budget but may only do so at least five business days before the Board meeting at which it will be considered
    - 6.5.4 The Authority must provide a copy of its annual business plan and Budget to the Constituent Councils within five business days after adoption by the Board.
    - 6.5.5 Reports summarising the financial position and performance of the Authority against the annual business plan and the Budget shall be prepared and presented to the Board every three calendar months and copies provided to the Constituent Councils within five days of the Board meeting to which they have been presented.
  - 6.6 *Reporting*
    - 6.6.1 The Authority must submit to the Constituent Councils by 30 September in each year in respect of the immediately preceding financial year, a report on the work and operations of the Authority detailing achievement of the aims and objectives of its Business Plan and incorporating the audited Financial Statements of the Authority and any other information or reports required by the Constituent Councils.
    - 6.6.2 The Board shall present a balance sheet and full financial report to the Constituent Councils at the end of each financial year.

**7. MISCELLANEOUS**

  - 7.1 *Equitable Interest*
    - 7.1.1 Subject to subclause 7.1.2 the equitable interest of the Constituent Councils in the Authority is agreed as follows:
      - 7.1.1.1 City of Holdfast Bay: 15%.
      - 7.1.1.2 City of Marion: 30%.
      - 7.1.1.3 City of Onkaparinga: 55%.
    - 7.1.2 The equitable interests of the Constituent Councils in the Authority as set out at subclause 7.1.1 may be varied by agreement of the Constituent Councils and will be varied where a new Constituent Council or Councils is admitted to or an existing Constituent Council withdraws from the Authority pursuant to Clause 3.1.
  - 7.2 *Insurance Requirements*
    - 7.2.1 The Authority shall register with the Local Government Mutual Liability Scheme and comply with the Rules of that Scheme.
    - 7.2.2 The Authority shall advise Local Government Risk Management Services of its insurance requirements relating to Local Government Special Risks including buildings, structures, vehicles and equipment under the management, care and control of the Authority.
    - 7.2.3 The Authority must register with the Local Government Workers Compensation Scheme and comply with the Rules of that Scheme.
  - 7.3 *Winding Up and Statutory Guarantee*
    - 7.3.1 On winding up of the Authority, the surplus assets or liabilities of the Authority, as the case may be, shall be distributed between or become the responsibility of the Constituent Councils in the same proportion as their equitable interest in the Authority in accordance with subclause 7.1.
    - 7.3.2 If there are insufficient funds to pay all expenses due by the Authority on winding up (or at any other time there are unfunded liabilities which the Authority cannot meet), the Constituent Councils must financially contribute in proportion to their equity share for the purpose of satisfying their statutory guarantee of the liabilities of the Authority.

7.4 *Common Seal*

- 7.4.1 The Authority will have a common seal, which may be affixed to documents requiring execution under seal and where affixed must be witnessed by two Board Members or where authority has been conferred by instrument executed under the common seal of the Authority, by the Chair of the Board and the Chief Executive Officer.
- 7.4.2 The common seal must not be affixed to a document except to give effect to a resolution of the Board.
- 7.4.3 The Chief Executive Officer must maintain a register which records the resolutions of the Board giving authority to affix the common seal and details of the documents to which the common seal has been affixed with the particulars of persons who witnessed the fixing of the seal and the date that the seal was affixed.

**8. DISPUTE RESOLUTION**

8.1 About this Clause:

- 8.1.1 The procedure in this Clause must be applied to any dispute that arises between the Authority and a Constituent Council concerning the affairs of the Authority, or between Constituent Councils concerning the affairs of the Authority, including as to the meaning or effect of this Charter.
- 8.1.2 The Authority and a Constituent Council must continue to observe and perform this Charter despite the dispute.
- 8.1.3 This Clause does not prejudice the right of a party:
  - 8.1.3.1 to require the continuing observance and performance of this Charter by all parties; or
  - 8.1.3.2 to institute proceedings to enforce payment due under this Charter or to seek injunctive relief to prevent immediate and irreparable harm.
- 8.1.4 Subject to this Clause, a dispute must not be the subject of legal proceedings between any of the parties in dispute. If legal proceedings are initiated or continued in breach of this provision, a party to the dispute is entitled to apply for and be granted an order of the court adjourning those proceedings pending completion of the procedure set out in this Clause.

8.2 **Dispute Resolution Process**

- 8.2.1 The Constituent Councils and the Authority agree to work together in good faith to resolve any matter requiring their direction or resolution.
- 8.2.2 A party to the dispute must promptly notify each other party to the dispute:
  - 8.2.2.1 of the nature of the dispute, giving reasonable details; and
  - 8.2.2.2 what action (if any) the party giving notice thinks will resolve the dispute; but a failure to give such notice does not entitle any other party to damages.
- 8.2.3 Upon receipt of a notice under subclause 8.2.2, the parties to a dispute may agree to refer the dispute for mediation by a mediator agreed by the parties or, if no agreement can be reached, a mediator nominated by the then President of the of the South Australian Bar Association (or equivalent officer of any successor organisation). The cost of any mediation are to be borne by the parties to the dispute in equal shares.
- 8.2.4 Where the parties are unable to resolve a matter (including by way of any mediation process) within ninety (90) days of the matter being presented to them, the matter will be referred for arbitration in accordance with this Clause 8.2.
- 8.2.5 There must be only one arbitrator who must be a natural person agreed by the parties or, if they cannot agree within fourteen business days, an arbitrator nominated by the then Chairperson of the Resolution Institute.
- 8.2.6 The role of the arbitrator is to resolve the dispute and make decisions binding on the parties; The arbitration must take place in a location in Adelaide determined by the arbitrator.
- 8.2.7 A party must cooperate in arranging and expediting arbitration.
- 8.2.8 A party must send to the arbitration a senior manager with authority to resolve the dispute.
- 8.2.9 The parties may provide evidence and given written and verbal submissions to the arbitrator within the time set by the arbitrator.
- 8.2.10 The arbitrator must:
  - 8.2.10.1 consider the evidence and submissions, decide the dispute; and
  - 8.2.10.2 give written reasons to each party.
- 8.2.11 Subject to this Clause, the arbitration must take place in accordance with the provisions of the *Commercial Arbitration Act 2011* or subject to this Clause, the arbitrator must fix the rules of arbitration.
- 8.2.12 The costs and expenses of the arbitrator and of each party must be borne as the arbitrator decides.

**9. CIRCUMSTANCES NOT PROVIDED FOR**

If any circumstances arise about which this Charter is silent, incapable of taking effect or being implemented according to its strict provisions, the Board has the power to consider the circumstance and determine the action to be taken.

Dated: 6 June 2024

CHRIS ADAMS  
Chief Executive Officer

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# Attachment 2

3 March 2025

SRWRA Constituent Council CEOs  
Phu Nguyen, City of Onkaparinga  
Tony Harrison, City of Marion  
Pamela Jackson, City of Holdfast Bay

Sent via email

Dear Constituent Council CEOs

### **Amendment of SRWRA Charter 2024 to include an additional independent Board Member**

The SRWRA Board, at its meeting on 24 February 2025, resolved to seek the approval of the Constituent Councils to increase the number of Board members of the Authority up to a maximum of nine persons to enable the recruitment of additional independent Board members to supplement the skills and expertise of the existing Board and provide for succession planning. The resolution of the Board is as follows:

“The Board resolved to seek the approval of the Constituent Councils to amend clause 4.2 of the Charter to increase the number of Board members up to a maximum of nine, the Charter would therefore be amended to read as follows.

#### 4.2 Membership of the Board

4.2.1 The Board shall consist of eight up to nine members appointed as follows:

4.2.1.1 two persons appointed by each Constituent Council, one of whom must be a senior officer of the Constituent Council making the appointment;

4.2.1.2 two persons to a maximum of three persons appointed jointly by the Constituent Councils who are not members or officers of a Constituent Council but who, in the opinion of the Constituent Councils, have expertise in waste management and/or business. These persons will be chosen from a list of persons circulated to the Constituent Councils Chief Executive Officers to beand appointed by a panel comprising the Chief Executive Officers (or their nominee) and one other person from each Constituent Council as nominated by the Chief Executive Officer of that Council.”

The Board formed its view during the current recruitment exercise for the independent Board Member position added to the SRWRA Charter as part of the 2024 update. Two candidates were considered appropriate for recommendation of appointment to the Constituent Council CEOs whilst only one Board position is currently available in accordance with the Charter.



The rationale for the amendment is:

- The term of the Independent Chairperson expires on 14 September 2026, which may result in a significant loss of intellectual property and corporate knowledge for the organisation.
- The Deputy Chairperson (Council Officer and long-term Board Member) is commencing extended leave in April 2025 which represents a significant loss of intellectual property and corporate knowledge for the organisation.
- The Elected Members on the Board are appointed until the next Council Election due in November 2026 and are always at risk of changeover following the election.
- With the Deputy Chairperson on extended leave, the remaining Council Officer Board Members are each in their first term of appointment.
- The introduction of a third independent Board Member will provide additional skills and expertise as key roles depart.
- The pool of independent members on the Board may become suitable candidates for the Chairperson role when the position becomes vacant.
- The timing of appointment of independent members is critical to ensure intellectual property and corporate knowledge is built prior to key Board member departures with respect to the business of the Authority and in particular the operations of the joint ventures.

The recent SRWRA Organisational Review interviews held with the Constituent Councils CEOs captured interest expressed of SRWRA transitioning to a skills-based Board. The appointment of a third independent member, whilst not fully addressing the matter, contributes to that direction.

The Board requests this matter be tabled at the next available council meeting to enable the recruitment process to be completed.

The Board Chairperson and I are available to meet with you to discuss this request or attend Elected Member Briefings / Council Meetings to assist in progressing the matter if required.

Yours Sincerely



Chris Adams  
Chief Executive Officer